Supreme Court, U.S.
FILED

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96 651 OCT 16 1996
No. 96-

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1996

JAMES E. GILBERT, ***et al.*****,**
Petitioners

v.

RICHARD J. HOMAR,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR CERTIORARI

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97 pp

QUESTION PRESENTED

Whether the suspension without pay of a public employee always, regardless of circumstances, requires a pre-suspension hearing?

LIST OF PARTIES

The petitioners are four officials of East Stroudsburg University, part of the Commonwealth of Pennsylvania's State System of Higher Education: President James E. Gilbert, Director of Human Resources Gerald Levanowitz; Police Chief David Marazas; and Vice-President Curtis English. The respondent is Richard J. Homar.

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STATEMENT OF JURISDICTION

The judgement of the Court of Appeals was filed on July 18, 1996, and this petition was filed within ninety days thereafter, on October 16, 1996. The Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment's Due Process Clause provides in relevant part that "No State shall … deprive any person of life, liberty, or property, without due process of law." U.S. Const., Art. XIV, § 1.

STATEMENT OF THE CASE

The issue in this case is whether it is ever permissible for public officials to suspend an employee without pay, before giving the employee a hearing. The Court of Appeals for the Third Circuit held that a pre-hearing suspension without pay is never permissible under the Due Process Clause, regardless of the length of the suspension, the exigency of the circumstances surrounding it, and the likelihood that it is warranted. The Court of Appeals relied on dicta from the Court's decision in *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985), while acknowledging that the Court has never directly addressed this issue, and that the courts of appeals are deeply divided over it. The Court should therefore take this opportunity to resolve the issue, which is important to the day-to-day functioning of government at all levels.

1. This case arises from the attempts of state university officials to discipline one of the university's police officers after he was arrested and charged with drug-related offenses. The petitioners are four officials of East Stroudsburg University, part of Pennsylvania's State System of Higher Education: President James E. Gilbert; Director of Human Resources Gerald Levanowitz; Police Chief David Marazas; and Vice-President Curtis English. The respondent is Richard J. Homar, formerly a member of the University's police force who is now employed by the University as a groundskeeper.

On August 26, 1992, members of the Pennsylvania State Police arrested Homar during a drug raid at the home of a friend. Pet. App. 49a. The State Police charged Homar with possession of marijuana, possession with intent to deliver, and criminal conspiracy, a felony. *Ibid*. The State Police informed Chief Marazas, Homar's supervisor, of Homar's arrest and the charges against him, *ibid*; and Marazas in turn told Human

Resources Director Levanowitz, to whom President Gilbert had delegated authority to discipline and suspend university employees. Pet. App. 50a. Levanowitz decided to suspend Homar without pay. *Ibid.*

Homar did not report to work that day. The next day, however, he called Chief Marazas, told him that he had been arrested, and asked whether he was suspended. *Ibid.* Marazas told him that he was, and later that day delivered to Homar a letter from Levanowitz. The letter confirmed that Homar was suspended pending further investigation, and explained that the University's final decision in the matter would not necessarily coincide with disposition of the criminal charges against him. *Ibid.*

About three weeks later, on September 18, Levanowitz and Marazas met with Homar and his union representative. Pet. App. 54a. In the meantime, the criminal charges against Homar had been dismissed, Pet. App. 52a, and Levanowitz had met with the State Police and obtained an investigative report from them. Pet. App. 52a-53a. Levanowitz told Homar that he had completed his investigation and that he had received some "very serious" evidence about Homar from the State Police. Pet. App. 54a. He invited Homar to give his account of what occurred on the day of his arrest and Homar did so. *Ibid.* By letter dated September 23, Levanowitz demoted Homar to the position of groundskeeper. Pet. App. 54a. He was, however, given back pay for the period of his suspension at his former pay rate.[1] Pet. App. 55a.

The next day, Homar and his union representative met with President Gilbert. Pet. App. 56a-57a. Gilbert gave Homar an opportunity to respond to the charges and to Levanowitz's decision, Pet. App. 57a, but sustained

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[1] Homar was initially given back pay only at the lower rate paid to a groundskeeper, but this was later increased to the higher rate. Pet. App. 55a.

Levanowitz' decision the same day. *Ibid.*

2. Homar brought this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Middle District of Pennsylvania, seeking damages and reinstatement to his former position. All of Homar's claims arose under the Fourteenth Amendment's Due Process Clause. As relevant here, Homar claimed that the petitioners' failure to give him a hearing before suspending him violated his right to procedural due process.[2]

The District Court rejected all of Homar's claims and granted the petitioners' motion for summary judgment. As to Homar's suspension without pay, the District Court applied the balancing test from *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). The District Court recognized that Homar had a strong private interest in continuing to receive his salary, but also held that the University had a compelling interest in preserving public confidence in law enforcement; and that under the circumstances, the likelihood of governmental error was slim. Taking all these interests into account, and considering also that the deprivation suffered by Homar was both temporary and brief, the District Court held that postponing the hearing on Homar's suspension did not violate the Due Process Clause. Pet. App. 58a-63a.

3. A divided panel of the Court of Appeals reversed the

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[2] Homar also claimed that the hearing given to him before his demotion was procedurally inadequate; that his suspension and demotion violated his right to substantive as well as procedural due process; and that the petitioners had deprived him of protected liberty, as well as property, interests. Pet. App. 63a-73a. None of these claims is before the Court.

District Court's decision on the suspension without pay issue.[3] Pet. App. 7a-17a. The majority agreed with the District Court that

> there was a compelling governmental interest which supports [the university's] decision to suspend Homar immediately and without a hearing pending further investigation. The university has a substantial interest in maintaining public confidence in [its] police force, and Homar's arrest on drug charges certainly suffices to ensure that the university' s concerns were not baseless or unwarranted ....

Pet. App. 11a. Nevertheless, the majority held that the petitioners had violated Homar's due process rights "because he was suspended *without pay*." *Ibid* (emphasis in original).

The panel majority relied primarily on dicta from the Court's decision in *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985). In *Loudermill*, the Court discussed the possibility that a public employer might need to remove an employee immediately without hearing, and suggested that "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem *by suspending with pay*." *Id.*, at 544-45, *quoted at* Pet. App. 11a (emphasis added by the Court of Appeals). This, in the view of the panel majority, "strongly suggests that suspension without pay must be preceded by notice and an opportunity to be heard *in all instances*." *Ibid* (emphasis added).

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[3] On Homar's other claims, the Court of Appeals reversed the District Court's decision on the adequacy of the hearing given to Homar before his demotion, and on his substantive due process claim; but affirmed the District Court on his liberty interest claim. Pet. App. 17a-27a.

The majority recognized that at least two other courts of appeals had considered the same language from *Loudermill* and had reached the contrary conclusion. Pet. App. 12a & n. 12, *citing Engdahl v. Dept. of Navy*, 900 F.2d 1572 (Fed. Cir. 1990) *and Bailey v. Board of County Com'rs of Alachua County*, 956 F.2d 1112 (11th Cir. 1992). They nevertheless held that "a governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing." Pet. App. 14a.

Judge Alito dissented from the majority's "blanket rule," Pet. App. 31a. Judge Alito relied on the Court's recognition in *Loudermill* that "[t]here are, of course, some situations in which a postdeprivation hearing will satisfy due process requirements," Pet. App. 31a, *quoting Loudermill*, 470 U.S. at 542 n.7, and on the Court's observation in *FDIC v. Mallen*, 486 U.S. 230 (1988), that

> [a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.

Id, at 240, *quoted at* Pet. App. 29a. He would have applied the balancing test of *Logan* and other cases, and would have held that under circumstances such as those presented by this case, there is no requirement that a public employer must pay its suspended employees. Pet. App. 30a. As to the dicta from *Loudermill* relied on by the majority, Judge Alito agreed with the *Engdahl* court that the Court's language in *Loudermill*

> is merely descriptive, not normative. We agree that in the instant case, the government could

> have suspended with pay. Nevertheless, we cannot read *Loudermill* as holding that the government must suspend him with pay.

Pet. App. 31a, *quoting Engdahl*, 900 F.2d at 1578.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS FROM FIVE OTHER CIRCUITS.

The Third Circuit recognized that its *per se* rule that "suspension without pay must be preceded by notice and an opportunity to be heard *in all instances*," Pet. App. 11a (emphasis added), conflicts with the decisions of at least two other courts of appeals. Pet. App. 12a. In both *Engdahl v. Dept. of Navy*, 900 F.2d 1572 (Fed. Cir. 1990) and *Bailey v. Board of County Com'rs of Alachua County*, 956 F.2d 1112 (11th Cir. 1992), the courts squarely considered the same language from *Loudermill* relied on by the Third Circuit, but concluded that the Court did not by that language mean to impose a blanket rule against pre-hearing suspensions without pay. *Engdahl*, 900 F.2d at 1578; *Bailey*, 956 F.2d at 1124 n. 13.[4]

In addition, at least three other circuits have discussed *Loudermill*, although not the precise language relied on by the Third Circuit, in decisions upholding the constitutionality of pre-hearing suspensions without pay. *See Jones v. City of Gary, Ind.*, 57 F.3d 1435, 1441 (7th Cir. 1995); *Ambus v. Granite Bd. Of Education*, 975 F.2d 1555, 1562 (10th Cir. 1992); *Strong v. Bd. of Ed. of Uniondale Union Free Sch. Dist.*, 902 F.2d 208, 211 (2d. Cir. 1990). None of these decisions can be reconciled with the Third Circuit's holding in this case. The Court should review this case in order to resolve this conflict.

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[4] As the Third Circuit pointed out, Pet. App. 11a-12a & n. 12, an earlier decision of the Eleventh Circuit agreed with its reading of *Loudermill*. *See Everett v. Napper*, 833 F.2d 1507 (11th Cir. 1987).

II. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.

The Third Circuit's *per se* rule against pre-hearing suspensions without pay is inconsistent with the flexible analysis which has long been the hallmark of the Court's procedural due process jurisprudence. The Court has long emphasized

> the truism that due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.... [D]ue process is flexible and calls for such procedural protections as the particular situation demands.

Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (citations and internal quotation marks omitted). The Court has consistently held that the Due Process Clause requires, in each case, a particularized balancing of the private and governmental interests at stake, the need to avoid administrative burdens and the probable value of additional safeguards, and the risk of an erroneous deprivation. *See, e.g., Loudermill*, 470 U.S. at 542-43; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982).

Most importantly for this case, the Court has repeatedly rejected the idea that due process "always requires the State to provide a hearing prior to the initial deprivation of property." *Parratt v. Taylor*, 451 U.S. 527, 540 (1981), *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). Rather, "there are ... some situations in which a post-deprivation hearing will satisfy due process requirements."

Loudermill, 470 US. at 542 n. 7. Even in employment cases,

> [a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.

FDIC v. Mallen, 486 U.S. 230, 240 (1988).

The Third Circuit's imposition of a blanket rule to govern all cases of suspension without pay simply cannot be squared with this well-settled analysis. The Court should review this case to correct this error, and to resolve the tension which the Third Circuit perceived to exist between the Court's dicta in *Loudermill* and its holdings in *Mallen* and the other cases cited above.

III. THE ISSUE PRESENTED BY THIS CASE IS IMPORTANT TO PUBLIC EMPLOYERS AT ALL LEVELS OF GOVERNMENT.

As the cases cited in this petition and in the decisions below illustrate, governments at all levels are frequently faced with the urgent need for prompt action to protect the public confidence, and even the public safety, when public employees are charged with criminal or other wrongdoing. *See, e.g., Engdahl v. Dept. of Navy, supra* (naval employee charged with sexual offenses against child); *Bailey v. Board of County Com'rs of Alachua County, supra* (prison guard arrested for collusion in escape); *Ambus v. Granite Bd. Of Education, supra* (teacher arrested on drug charges). When these situations arise, it is important that officials know what they may and may not do, consistent with the Constitution, to protect the public. The Court should review this case to provide that guidance.

CONCLUSION

For these reasons, the Court should grant the petition for the writ of certiorari and, upon review, reverse the judgment of the Court of Appeals on the respondent's suspension-without-pay claim.

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October 16, 1996

Filed July 18, 1996

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 95-7218

Richard J. HOMAR,
Appellant

v.

JAMES E. GILBERT, Individually, and in his capacity as Pres. of E.S. Univ.; GERALD LEVANOWITZ, Individually, and in his capacity as director of Human Res. at E.S. Univ.; DAVID MARAZAS, Individually, and in his capacity as Police Chief of E.S. Univ.; CURTIS ENGLISH, Individually, and in his capacity as V.P. of E.S. Univ.

Appeal from the United States District Court for the Middle District of Pennsylvania (D.C. Civil No. 93-cv-0852)

Submitted Under Third Circuit LAR 34.1(a)
Thursday, November 2, 1995

Before: NYGAARD, ALITO, and SAROKIN,
Circuit Judges

(Filed July 18, 1995)

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OPINION OF THE COURT

SAROKIN, ***Circuit Judge.***

Plaintiff Richard Homar was suspended without pay from his position as a police officer at East Stroudsburg University after his arrest on drug-related charges. The criminal charges against Homar were eventually dismissed, but Homar was nonetheless subsequently demoted to the position of groundskeeper. Homar filed suit in federal district court seeking reinstatement, backpay and damages for violations of his due process rights. The district court entered summary judgment in favor of defendants. Plaintiff appeals.

Although we conclude that these circumstances warranted and justified an immediate suspension of employment without a hearing, the added suspension of pay necessitated a hearing. Furthermore, the subsequent restoration of that pay cannot serve to cure the due process violation. It may serve to reduce the damages to which the employee may be entitled, but the deprivation must be viewed at the time of its occurrence, not as belatedly corrected by later action; otherwise employers could violate the due process rights of their employees and simply cure those violations through the means of retroactive pay.

We also hold that once suspended, an employee is entitled to a hearing before any further action is taken to demote, terminate, or extend his suspension. At such a hearing, the employee is entitled to know the evidence against him and be afforded the opportunity for a meaningful response. We conclude that there is a genuine issue of material fact as to whether such a hearing was afforded here, and we thus reverse the order of summary judgment.

I.

Plaintiff Richard Homar was employed as a police officer at East Stroudsburg University ("ESU"). On August 26, 1992, Homar was arrested when a drug raid took place at the home of his friend, James Crompton, whom he was visiting. That same day, the Pennsylvania State Police filed a criminal complaint against Homar charging him with possession of marijuana, possession with intent to deliver and criminal conspiracy.

The state police called David Marazas, ESU's police chief and Homar's supervisor, to inform him of Homar's arrest and the charges against him. Marazas then informed Gerald Levanowitz, ESU's Director of Human Resources, to whom ESU President James Gilbert had delegated authority to discipline and suspend ESU employees. Levanowitz decided immediately to suspend Homar without pay. No pre-suspension hearing was held.

On August 27, Homar received a letter from Levanowitz advising him that he was suspended without pay pending further investigation and disposition of the criminal charges. The letter advised Homar that any administrative action taken by the University against him "[did] not have to coincide with the disposition of those charges through the legal process." Appendix ("App.") at 197.

District Justice Charles P. Eyer dismissed all criminal charges against Homar on September 1, 1992. Levanowitz still refused to lift Homar's suspension.

On September 11, 1992, Levanowitz, along with two ESU police sergeants who were assigned to conduct an investigation on Homar, met with two state troopers and a Corporal to discuss Homar's situation. App. at 143. One of the troopers was the state trooper who signed the criminal complaint against Homar. At this meeting, Levanowitz was provided with a copy of a page from the Pennsylvania State Police investigative file regarding Homar, called the "Supplemental Report." This report includes statements attributed to Homar that he allegedly made to the Pennsylvania State Police when he was interviewed shortly after his arrest. According to the Supplemental Report, Homar admitted his knowledge of drug dealing by Crompton and another man named Habhab, and Homar further admitted that he had received marijuana from Habhab for his own use while he was employed as an ESU police officer. Homar contests that he ever made these statements.

On September 15, 1992, Levanowitz called Homar and arranged for a meeting three days later. Levanowitz explained that this meeting would be an "administrative hearing," and that accordingly Homar had a right to have his union representative present but that he did not have a right to legal counsel.

Homar attended this meeting on September 18, 1992, along with his union representative. Besides Levanowitz, Marazas was also present, as well as Levanowitz's secretary. At the start of the meeting, Homar's union representative requested that Homar's attorney be present. Levanowitz responded that if Homar so chose, they would have to postpone the meeting until a later time. Homar opted to proceed with the meeting unrepresented. According to the notes taken by

Levanowitz's secretary, Levanowitz made the following statement to Homar:

> The purpose of this meeting today is to give you an opportunity to provide any information on your own behalf that would assist us in making a determination concerning the action that would end your suspension and any information that would be of help to you in presenting your case.

App. at 205.

Levanowitz maintained at a deposition held later that he had told Homar that "the State Police had given [him] some evidence very serious in nature," App. at 164, and that he offered Homar the opportunity to present his side of the story. Levanowitz never informed Homar that he had received the Supplemental Report from the state police containing his alleged confession.

On September 23, 1992, Levanowitz wrote a letter to Homar advising him that he was being demoted from the position of police officer to the position of groundskeeper. The text of the letter reads, in pertinent part, as follows:

> This is to inform you that you are to be demoted from your position as a Police Officer I in the Campus Police Department to the position of Groundskeeper ... . The action is effective retroactive to August 26, 1992, and you are to be given back pay to that date at the rate of pay for a Groundskeeper. You are to report to work at 7:00 A.M. on September 24, 1992 at the Facilities Management Office. Your new rate of

> pay as Groundskeeper will be $552.80 bi-weekly.[1]
>
> This action is being taken as a result of admissions made by yourself to the Pennsylvania State Police on August 26, 1992 that you maintained association with individuals whom you knew were dealing in large quantities of marijuana and you obtained marijuana from one of those individuals for your own use. Your actions constitute a clear and flagrant violation of Sections 200 and 200.2 of the East Stroudsburg University Police Department Manual.

App. at 208 (footnote added).

After this letter was issued, the president of the union representing Homar requested that Homar have an opportunity to meet with President Gilbert regarding the letter. The meeting occurred on September 24, 1992 at 2:00 p.m. By this time, Homar had received and read a copy of the Supplemental Report. Gilbert provided Homar with an opportunity to respond to the charges and to Levanowitz's decision. Gilbert nonetheless sustained the suspension.

After failing to obtain relief through his union grievance procedure, Homar filed a complaint in the district court for the Middle District of Pennsylvania against Gilbert, Levanowitz and Marazas. His complaint alleges that the procedures by which he was suspended and then demoted lacked required due process, that defendants' actions deprived him of liberty and property, and that his substantive due process rights were also violated. The district court entered summary judgment in favor of the defendants on March 17, 1995. Homar then appealed to this court.

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[1] On February 16, 1993, Levanowitz directed retroactive payment to Homar of the difference in groundskeeper salary and police officer's salary for the period of his suspension.

II.

The district court had jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 1983. This court has jurisdiction over the appeal of the district court's final decision under 28 U.S.C. § 1291.

Our review of the district court's order for summary judgment is plenary, and we thus apply the same standards that were applicable in the district court. *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1530 (3d Cir., 1990), *cert. denied*, 499 U.S. 921 (1991). Summary judgment is appropriately granted when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). If, however, "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), summary judgment shall not be granted. Homar, as the nonmoving party, is entitled to have all reasonable inferences drawn in his favor. *See J.F. Feeser*, 909 F.2d at 1531.

III.

Homar's first claim is that ESU failed to provide him a meaningful pre-deprivation hearing prior to his suspension without pay and his subsequent demotion from police officer to groundskeeper.

In *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985), the United States Supreme Court held that when a public employee has a property interest in his or her employment he or she is entitled to a meaningful pre-termination hearing. Such a hearing need not be elaborate, but rather "an initial check against mistaken decision--essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id*. at 545-46. *Loudermill* specifically requires that prior to termination:

> [a] tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

Id. at 546.

The Supreme Court has made it eminently clear that due process entitles a party to such a hearing "*before* he [or she] is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *see also Loudermill*, 470 U.S. at 542; *Bell v. Burson*, 402 U.S. 535, 542 (1971). This fundamental right to a pre-deprivation hearing is not abridged by the availability of extensive post-deprivation remedies. *See Morton v. Beyer*, 822 F.2d 364, 368 (3d Cir.1987) (holding that "the availability of extensive post-termination procedures does not eliminate the essential requirement of due process that a hearing be provided before discharge"); *Gniotek v. City of Philadelphia*, 808 F.2d 241, 243 (3d Cir.1986) (noting that "[t]he predeprivation hearing need not be elaborate, but it is necessary, even if extensive post-deprivation remedies are afforded."), *cert. denied*, 481 U.S. 1050 (1987).

While we recognize that Homar was not completely terminated from his employment with ESU, he was terminated from his position as a police officer and received a reduction in his pay. Accordingly, we find the requirements of *Loudermill* to be applicable in this instance. Indeed, there is no dispute among the parties that Homar had a property interest in his employment as police officer. Rather, the dispute concerns the degree of due process to which Homar was entitled prior to his suspension without pay and prior to his demotion from his position as police officer to groundskeeper.

A.

We will first address Homar's contention that he was entitled to notice and an opportunity to be heard prior to his suspension without pay from his position as an ESU police officer.

It is undisputed that Homar was not afforded any kind of hearing prior to his suspension without pay immediately following his arrest on drug charges. ESU nonetheless argues that Homar's due process rights were not violated because, while Homar's interest in remaining in his job is "an important one," ESU had a compelling interest in "taking prompt action to maintain public confidence in its police force." Appellee's Brief at 15. Indeed, the Supreme Court has explained that

> [a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.

FDIC v. Mallen, 486 U.S. 230, 240 (1988); *see also Boddie*, 401 U.S. at 379 (noting that there can be "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event").

The district court agreed with ESU, finding that it was permissible for the university to suspend Homar without pay and without a hearing. The court first noted that "[b]oth the timing and the nature of requisite process depends upon an 'appropriate accommodation of the competing interests involved.' " *Homar v. Gilbert*, No. CV-93-0853, typescript at 11 (M.D.Pa., March 17, 1995) (hereinafter "D. Ct. Op.") (citing *Goss v. Lopez*, 419 U.S. 565, 579 (1975)). It then applied the analysis prescribed by *Logan v. Zimmerman Brush Co.*, assessing the competing interests involved, including "the importance of the private interest, and the length and finality of the deprivation, ... the likelihood of governmental error, ... and the magnitude of the governmental interests involved." *Id.*, typescript at 11 (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982)). While the district court recognized that Homar's "private interest was strong," it found that "the deprivation incident to a suspension was only temporary and of a relatively brief duration (approximately one month)." *Id.*, typescript at 11. The district court concluded that Homar's interest in avoiding such a "temporary" and "brief" deprivation was not as compelling as "the governmental interest in preserving public confidence in law enforcement." *Id.*, typescript at 12. The court found its conclusion bolstered by the fact that Homar was eventually awarded full pay and benefits for the period of suspension, noting that " '[s]uspension with pay does not raise due process concerns.' " *Id.*, typescript at 13 (quoting *Hicks v. City of Watonga, Okl.*, 942 F.2d 737, 746 n. 4 (10th Cir.1991).

We agree with the district court that there was a compelling governmental interest which supports ESU's decision to suspend Homar immediately and without a hearing pending further investigation. The university has a substantial interest in maintaining public confidence in the ESU police force, and Homar's arrest on drug charges certainly suffices to ensure that the university's concerns were not baseless or unwarranted, as required by the Supreme Court. *See Mallen*, 486 U.S. at 240. In circumstances where public safety is implicated, "[n]ot even an informal hearing ... must precede a deprivation." *Caine v. Hardy*, 943 F.2d 1406, 1412 (5th Cir.1991) (en banc), *cert. denied*, 503 U.S. 936 (1992).

Nonetheless, we find that Homar's due process rights were violated because he was suspended *without pay*. The Supreme Court's decision in *Loudermill* strongly suggests that suspension without pay must be preceded by notice and an opportunity to be heard in all instances. Initially, the Court noted that it had "frequently recognized the severity of depriving a person of the means of livelihood." *Loudermill*, 470 U.S. at 543. Then the Court explained that, while it recognized that there were some limited instances in which a strong governmental interest might warrant immediately removing a person from a position without a hearing, "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem *by suspending with pay*." *Id.* at 544-45 (emphasis added).

Other circuits which have examined this language in *Loudermill* have disagreed with regard to its precise mandate. At least one court of appeals has read *Loudermill* to require that an employee be provided an opportunity to be heard prior to suspension without pay. *See Everett v. Napper*, 833 F.2d 1507, 1512 (11th Cir.1987) (holding that, under *Loudermill* a suspended firefighter was entitled to a hearing prior to suspension because he was not paid during his suspension). The Federal Circuit, by contrast, noted that *Loudermill 's* prescription of suspension with pay in situations where significant hazards would result from continued employment was only dicta: "We agree that in the instant case, the government *could* have suspended with pay. Nevertheless, we cannot read *Loudermill* as holding the government *must* suspend ... *with pay.*" *Engdahl v. Dept. of Navy*, 900 F.2d 1572, 1578 (Fed.Cir.1990). Other circuits, while not explicitly addressing *Loudermill*, have on occasion allowed suspension without pay to stand even in the absence of a pre-deprivation hearing. *See, e.g., Jones v. City of Gary, Ind.*, 57 F.3d 1435, 1436 (7th Cir.1995); *Ambus v. Granite Bd. of Educ.*, 975 F.2d 1555, 1558, 1562 (10th Cir.1992), *modified on rehearing by*, 995 F.2d 992 (10th Cir.1993) (en banc).[2]

This court has not precisely addressed this issue in the past. However, our decision in *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064 (3d Cir.1990), may be read to imply that, under *Loudermill,* suspension without a pre-deprivation hearing is only constitutional if the suspension is one with pay.

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[2] In disagreeing with our conclusion that *Loudermill* suggests that a state employer may not suspend an employee without pay absent a pre-suspension hearing, the dissent lists several additional cases that it contends interpret the language in *Loudermill* differently. Dissent, at 26-28. Only *Engdahl* and *Bailey v. Board of County Com'rs of Alachua County*, 956 F.2d 1112, 1124 n. 13 (11th Cir.1992) actually squarely consider the *Loudermill* language, however, and the Eleventh Circuit in *Bailey* failed to acknowledge its previous contrary precedent in *Everett*. The remainder simply allow suspensions without pay and without a pre-deprivation hearing to stand without discussing whether *Loudermill* anticipates that such a practice should be permitted. In the absence of such discussions, we do not think these decisions can be characterized as reaching any conclusion one way or the other about the *Loudermill* language. Furthermore, we do not think that *Mallen* can be read to undermine the message of *Loudermill*, as it includes no discussion of suspension with pay versus suspension without pay; indeed, the opinion does not disclose whether the bank president there was suspended with pay or without pay.

In *Bradley*, we were called upon to decide, among other issues, whether a teacher who had been effectively suspended without pay and without a hearing for one year prior to being officially terminated, had been deprived of his procedural due process rights. The employer in *Bradley* ultimately provided Bradley full sabbatical pay for the year in question. The district court had relied upon *Loudermill* to conclude that the employer was entitled to suspend Bradley without a pre-suspension hearing because he eventually had been provided payment for the period of suspension. *Id.* at 1077. In reviewing this decision, we first acknowledged that under *Loudermill,* in circumstances where a governmental employer perceives substantial hazards in keeping an employee on the job, it may suspend the employee with pay until such time that a hearing may be held. *Id.* (citing *Loudermill*, 470 U.S. at 544-45). We concluded, however, that "*Loudermill* [did] not govern [that] case because Bradley was suspended *without* pay." *Id.* We thus implicitly, but necessarily, rejected the idea that a government employer could cite to the substantial hazards of keeping an employee on the job and thereby suspend him without a pre-suspension hearing *without* pay. Had we determined that Bradley had been suspended *with* pay, we presumably would have found that the *Loudermill* exception--essentially the *Mallen* exception--applied. Thus, while *Bradley* does not explicitly declare that suspension without pay and without a pre-suspension hearing always violates due process, such a holding may be inferred from its reasoning.[3]

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[3] As the dissent points out, later in the *Bradley* opinion, we did expressly reserve decision on whether Bradley was entitled to a pre- or post-suspension hearing, noting that Bradley was not provided any hearing whatsoever. The discussion as written in *Bradley* does suggest that, had Bradley been provided a post-suspension hearing, the court envisioned that it might have found a post-suspension hearing was adequate under *Mallen*. However, we did not consider the question in any detail. Had we done so, we would have realized that a conclusion that a post-suspension hearing was sufficient would be inconsistent

Today we clearly enunciate that a governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard. We think that such a holding is not only consistent with, and suggested by, *Loudermill,* but it is also eminently sensible. It is imperative that employers be provided with adequate flexibility to allow them to protect the public and respond to emergency situations expediently. Suspension with pay addresses these important concerns while simultaneously protecting the fundamental rights of an employee to due process prior to being deprived of his or her property interest in employment and its accompanying salary.[4] Furthermore, this conclusion seems consistent with the Supreme Court's holding in *Zimmerman Brush* that, in determining the timing and nature of an appropriate hearing, courts should assess the competing interests involved and arrive at an appropriate accommodation. *Zimmerman Brush*, 455 U.S. at 434.[5]

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with our earlier conclusion that the *Loudermill* exception could not apply because Bradley was suspended without pay.

[4] The dissent questions the purpose a pre-deprivation hearing would have served in Homar's case, given that he had been arrested, admitted as much, and even anticipated being suspended. Dissent, 25 & n.1, 28-30. We think, however, that a pre-suspension hearing may have allowed Homar an important opportunity to present his side of the story, and deny any wrong-doing. While we anticipate that ESU probably would have decided to suspend Homar pending further exploration of the charges against him, had Homar had an opportunity to present his story, ESU may have decided to limit the scope of the suspension by, for example, not suspending his pay pending the investigation. Thus, although Homar may have been well aware of the reasons for his suspension, when ESU deprived him of a pre-deprivation hearing, he nonetheless was denied a meaningful opportunity to respond to the charges.

[5] The dissent properly places much emphasis on the importance of courts balancing competing interests and considering the particular circumstances of each case in determining the procedural due process requirements *See* Dissent, at 28. However, the dissent does not explain why, in order to maintain public confidence

As noted above, the district court treated Homar's suspension as a suspension with pay:

> That Homar was originally suspended without pay does not warrant a finding that he was deprived of property without due process. At most, he was denied use of his salary for a very brief period of time. To recognize a cause of action for denial of due process under these circumstances would clearly elevate form over substance.
>
> * * *
>
> Since he clearly could be suspended with pay without implicating due process concerns, and within one month after being suspended he was awarded full pay for the period of suspension, any injury resulting from the failure to provide an opportunity to be heard before the suspension was imposed is surely *de minimis*.

D. Ct. Op., typescript at 13-14.

We fundamentally disagree with the district court's conclusion. First, our decision in *Bradley* clearly indicates that the subsequent awarding of backpay does not remedy a due process violation:

> The right to procedural due process cannot be so ephemeral that it evaporates because an individual suspended without pay happened to obtain paid leave

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in the police department and to protect public safety, it is necessary that a ESU not only suspend Homar from acting as a police officer, but also deprive him of his salary. As noted above, we think that the substantial governmental interests implicated in this case are protected by allowing ESU to immediately suspend Homar without a pre-deprivation hearing, but with pay.

> thereafter.... That may affect the damages ultimately awarded, but if there was a violation of due process, [the employee] is entitled to have that right vindicated.

Bradley, 913 F.2d at 1077.

Second, Homar's suspension without pay cannot be viewed as *de minimis*. At the time that Homar was suspended, he was told that he was "to be suspended without pay, effective immediately on 8/26/92, from [his] position as a police officer at East Stroudsburg University." App. at 197. For a period of approximately one month, Homar's very livelihood was threatened because he received no salary. As far as Homar knew at the time of his suspension, he had no prospects whatsoever of receiving any wages for the indefinite duration of his suspension. It was not until he received his letter of demotion on September 24, 1992--nearly a month after he was suspended--that he learned he would be receiving backpay at the rate of a groundskeeper. While it is true that Homar eventually received backpay at the wage rate he earned as a police officer to cover the period of his suspension, we note that according to Defendant's Statement of Material Fact accompanying their Motion for Summary Judgment, Levanowitz did not authorize Homar's backpay at the rate of a police officer until February 16, 1993. Thus, for nearly six months, Homar was deprived of a salary that was rightfully his. Furthermore, there is evidence to suggest that ESU only agreed to pay this rate upon pressure from Homar's union representative.[6]

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[6] That ESU ultimately provided Homar backpay at the rate of a police officer for this period of his suspension is an indication that ESU was aware that it had erroneously deprived Homar of his salary.

Accordingly, we find that Homar was entitled to notice and at least some kind of hearing prior to being suspended without pay.[7] It is undisputed that Homar received no hearing prior to his suspension, and we conclude that the district court erred in granting summary judgment in favor of defendants on this issue.

B.

Homar further alleges that he was deprived of meaningful pre-termination due process in the course of his demotion to the position of groundskeeper.

As outlined above, *Loudermill* requires that a public employee with a property interest in his or her employment be granted a meaningful pre-termination hearing. *Loudermill*, 470 U.S. at 545-46. We reiterate that it is of paramount importance that this hearing take place prior to the deprivation. As explained above, absent compelling government interests justifying postponement of a hearing, the hearing must take place before the deprivation, *see Boddie,* 401 U.S. at 379; *Loudermill*, 470 U.S. at 542; *Bell*, 402 U.S. at 542, because "the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect." *Id.; see also, Board of Regents v. Roth*, 408 U.S. 564, 570 n. 7 (1972). Indeed, this right to pre-deprivation due process is so fundamental that it remains "even if extensive post-deprivation remedies are afforded." *Gniotek*, 808 F.2d at 243; *see also Morton*, 822 F.2d at 368.

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[7] The dissent contends that our reasoning is flawed because a public employer may suspend an employee for cause, with pay, without implicating any constitutionally protected property interest. Dissent 30. While the Tenth Circuit has squarely held suspension with pay does not implicate due process concerns, *see Hicks*, 942 F.2d at 746 n. 4, we are less sure that such is the case. While a salary is probably the most obvious property interest in employment, we think there are clearly other interests involved. In Homar's case they would include his interest in participating in the daily affairs of the ESU community as a police officer, along with his interest in the honor and respect that accompanies the post. *Cf. Mallen,* 486 U.S. at 240 (noting that a bank president's interest in the right "to continue to serve as president of the bank and *to participate in the conduct of its affairs* is a property right protected by the Fifth Amendment Due Process Clause") (emphasis added).

This pre-deprivation hearing need not be elaborate. As explained by the Supreme Court, " 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." *Loudermill*, 470 U.S. at 545 (citations omitted). Nonetheless, the hearing must be sufficient to inform the employee of the evidence against him or her and to respond to the evidence. *See Fraternal Order of Police Lodge No. 5 v. Tucker*, 868 F.2d 74, 80 (3d Cir.1989). "[A] *sina* [sic] *qua non* of a meaningful hearing is a sufficient explanation of the employer's evidence to permit a meaningful response." *Id.*

Under the circumstances presented here, where Homar was suspended from his position pending further investigation into his activities, it is clear that there was no compelling government issue at stake that would require ESU to immediately deprive Homar of his employment. Any concerns about preserving public safety or the integrity of the police force were met by Homar's suspension. The university thus was afforded the time it would need adequately to provide Homar a pre-deprivation hearing. The question for us to answer, then, is whether the university provided him such a hearing.

The district court concluded that the "administrative hearing" which took place on September 18 did not meet the due process requirements of a pre-deprivation hearing because it "did not allow [Homar] to make a meaningful response to the damaging information found in the supplemental report." D. Ct. Op., typescript at 15. We agree.

During the September 18 meeting, Levanowitz only told Homar that the State Police had given him some "evidence very serious in nature." App. at 164. While it safely can be presumed that Homar knew that ESU's concerns about his employment arose from his arrest on drug charges, Homar was not aware of the allegations made against him by the troopers that were presented in the Supplemental Report, namely that he allegedly confessed to knowing that Crompton and Habhab were drug dealers and to receiving marijuana from Habhab during his employment as a police officer. More to the point, Homar was completely unaware that Levanowitz had received a copy of the Supplemental Report containing these allegations. Under these circumstances it is very clear that Homar's right to a meaningful pre-deprivation hearing was denied. *See Tucker*, 868 F.2d at 80 (holding that suspended police officers who were not told anything specific about drug use allegations or the evidence regarding the allegations were deprived of their due process rights because they had no opportunity to explain or rebut evidence).

In spite of its conclusion regarding the insufficiency of the September 18 "administrative hearing," the district court entered summary judgment in favor of defendants because it concluded that Homar's September 24, 1995 meeting with President Gilbert, prior to which Homar had received and read the Supplemental Report, was a meaningful pre-termination hearing. D. Ct. Op., typescript at 16. Given that Homar was afforded an opportunity to review the Supplemental Report and offer meaningful responses to the allegations, we find that this meeting afforded Homar with sufficient procedural due process protections *assuming it took place prior to his demotion becoming effective*. While true that an employee is not entitled to a pre-*decision* hearing, *see Chung v. Park*, 514 F.2d 382, 387 (3d Cir.), *cert. denied,* 423 U.S. 948 (1975), only if this hearing took place before his demotion *took effect* can we conclude that he was afforded meaningful due process.

The district court held as a matter of law that Homar's dismissal from his position as a police officer took effect only after this meeting with President Gilbert. D. Ct. Op., typescript at 16. The district court found that the meeting, which took place at 2 p.m. on September 24, 1992, "occurred before Homar would have started his evening shift as police officer should Gilbert have decided to reinstate him to that position," *id.*, and thus concluded that "Gilbert's decision that Homar could not return to ESU as a police officer is properly viewed as the point in time when Homar was deprived of his position as an ESU police officer." *Id.*

We disagree with the district court that the point in time at which Homar's demotion became effective is clear. There is substantial evidence in the record to support a conclusion that Homar's demotion took effect *prior* to this meeting. Homar's meeting with Gilbert took place on September 24 at 2:00 p.m. The letter which Levanowitz sent to Homar apprising him that he had been demoted to Groundskeeper was dated on September 23, 1992. In that letter, Levanowitz informed Homar that he was "to be demoted from [his] position as a Police Officer I in the Campus Police Department to the position of Groundskeeper, a position [he] *formerly* held." App. at 208 (emphasis added). The letter further required that Homar "report to work at *7:00 A.M. on September 24, 1992,*" to start his job as groundskeeper, and informed Homar that this "action is effective retroactive to August 26, 1992." App. at 208 (emphasis added). Homar testified during a deposition that he was already working as a groundskeeper at the time of his September 24th, 2:00 p.m. meeting with Gilbert. There is thus evidence suggesting that Homar had already been demoted to groundskeeper by the time this meeting took place. If this is true, then Homar was deprived of a meaningful pre-deprivation hearing.

The district court based its contrary conclusion on two grounds. First, the court determined that "[t]he significance of the meeting was that Gilbert held ultimate decision-making authority regarding whether Homar would remain employed by ESU as a police officer." D. Ct. Op., typescript at 15. However, this meeting with Gilbert never would have occurred had Homar's union representative not sought to arrange for the meeting with Gilbert. App. at 225. This fact seems to suggest that Levanowitz's demotion of Homar would have become effective without Gilbert's approval, which would render Levanowitz's letter the final demotion. Levanowitz's authoritative tone in the letter similarly supports this conclusion.

The district court also concluded that the meeting with Gilbert had taken place prior to Homar's demotion because it occurred before 4 p.m., the time at which Homar would normally begin his shift as a police officer. *Id.* at 16. We disagree that the timing of the demotion is so clear. We think there is certainly an issue of material fact as to whether Homar's demotion became effective on August 26, as stated in the letter; at 7:00 a.m. on September 24, the date he was told to report to work as a groundskeeper; or at 4:00 p.m. on September 24, the time at which Homar would normally report to work as a police officer. Unless defendants expected Homar to act as both groundskeeper and police officer on September 24, the facts appear to support the conclusion that Homar's demotion was effective at the latest by 7 a.m. on the morning of September 24th, seven hours prior to his meeting with Gilbert.

We thus conclude that there is a genuine issue of material fact regarding the date and time at which Homar's demotion became effective, and that the district court's grant of summary judgment was therefore inappropriate. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (holding summary judgment is inappropriate if there is evidence "such that a reasonable jury could return a verdict for the nonmoving party."). Accordingly, we reverse the district court's entry of summary judgment regarding Homar's meaningful pre-deprivation hearing.

IV.

Homar also contends that there is an issue of material fact as to whether his substantive due process rights were violated. Relying on this court's precedent in *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 692 (3d Cir.1993) in which we stated that "[a] violation of substantive due process rights is proven: ... 'if the government's actions in a particular case were in fact motivated by bias, bad faith or improper motive ...,' " *id.* (quoting *Midnight Sessions, Ltd. v. City of Philadelphia,* 945 F.2d 683 (3d Cir.1991), *cert. denied,* 503 U.S. 984 (1992)), Homar points to several facts that he argues demonstrate that his suspension and demotion were motivated by bias, bad faith or improper motive.

The district court granted summary judgment in favor of defendants on this claim on the ground that there was no genuine issue of material fact as to whether Levanowitz, Gilbert or any other ESU official was motivated by bias, bad faith or improper motive.

While we agree with the district court that the evidence in this case does not support a conclusion that Levanowitz or any other ESU official was motivated by an improper motive in suspending and then demoting Homar, for there is, indeed, "nothing improper about conducting an investigation of a law enforcement officer who has been arrested, even if the charges are ultimately dismissed," D. Ct. Op., typescript at 23, we think that there is a question of material fact as to whether ESU officials acted in bad faith. Several events leading up to Homar's demotion suggest that Levanowitz did not engage in a good faith effort to accord Homar appropriate due process protection throughout his ordeal. Levanowitz never informed Homar that he had received and read the Supplemental Report prior to their September 18 meeting; Levanowitz ordered that a poll be taken among police officers regarding whether Homar should be allowed to return to the force, which is certainly a very strange proceeding outside the realm of traditional due process proceedings; and Levanowitz issued the September 23 letter of demotion prior to the meeting with President Gilbert--a meeting which occurred only after Homar's union representative requested it take place. Such events might lead a reasonable fact-finder to conclude that Homar's demotion was pre-determined and to view the entire demotion process as rigged to produce this result.

Our conclusion that there is a genuine issue of material fact as to whether ESU officials were motivated by bad faith, however, does not lead us to remand this matter simply for a factual finding. A more fundamental legal question must first be addressed, namely whether Homar's property interest in his state-created job is an interest worthy of protection under substantive due process. *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 598, 600 (3d Cir.1993) (holding that before addressing the sufficiency of the evidence of improper motive, a court addressing a substantive due process claim should first consider whether the plaintiff possesses a property interest worthy of substantive due process protection). Although Homar has succeeded in making a procedural due process claim, under the law of this circuit "not all property interests worthy of procedural due process protections are protected by the concept of substantive due process." *Reich v. Beharry*, 883 F.2d 239, 244 (3d Cir.1989). In order to state a substantive due process claim, "a plaintiff must have been deprived of a certain quality of property interest." *DeBlasio*, 53 F.3d at 600.

The parties did not address before the district court the question of whether a state-created property interest in employment is the "certain quality" of property interest worthy of protection under the substantive due process clause, nor did the district court consider it. While courts of appeals do have discretion to consider and resolve certain issues for the first time on appeal, such as where the proper resolution is not in doubt or where " 'injustice might otherwise result,' " *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)); *see also Nelson v. County of Allegheny*, 60 F.3d 1010, 1013 n. 3 (3d Cir.1995), it is a general rule that federal appellate courts do not consider an issue not passed upon below. *Singleton*, 428 U.S. at 120.

In the instant case, we think it appropriate to remand this issue for consideration in the first instance by the district court. Certainly this is not a situation where the proper resolution is clear. Rather, the case law of this circuit and the Supreme Court provides very little guidance as to what constitutes this "certain quality" of property interest worthy of protection under the substantive due process clause. We have held that "ownership is a property interest worthy of substantive due process protection," *id.*, but we have found that neither interest in prompt receipt of payment for professional services provided to the state, *Reich*, 883 F.2d at 244-45, nor state law entitlement to water and sewer services, *Ransom v. Marrazzo*, 848 F.2d 398, 411-12 (3d Cir.1988) are the "certain quality" of property interest worthy of substantive due process protection. We also have strongly suggested in dictum that a student's right to continued enrollment in a graduate program does not rise to such a level on the ground that such an interest bears " 'little resemblance to the fundamental interests that previously had been viewed as implicitly protected by the Constitution.' " *Mauriello v. U. of Med. & Dentistry of N.J.*, 781 F.2d 46, 40 (3d Cir.1986) (quoting *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 229-30 (Powell, J., concurring). None of the property interests formerly considered are especially analogous to the property interest in state-created employment. Given the complexity of this issue, we think it appropriate to allow the district court the first opportunity to consider it. Should this issue return to us on appeal, we will benefit from the district court's analysis. Furthermore, we have already determined to remand this matter on the procedural due process ground as well, eliminating any concern about the injustice of delaying the final conclusion of this case. Accordingly, we remand this question to the district court for consideration there.

V.

Additionally, Homar contends that a genuine issue of material fact exists as to whether Homar's due process rights were violated because defendants made public statements about his suspension that stigmatized Homar and damaged his reputation. Specifically, Homar alleges that ESU violated his protected liberty interest in two ways. First, he alleges that ESU seriously damaged his good name and reputation by publicly disclosing the charges against him. Second, Homar alleges that ESU imposed a stigma or disability on him, foreclosing his freedom to take advantage of other employment opportunities. We will address these two claims in turn.

A.

The Supreme Court has held that a person has a liberty interest in employment actions which require due process "where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him." *Roth*, 408 U.S. at 573. Homar claims that this liberty interest was implicated in the instant case because ESU's demotion of him " 'damage[d] his standing and associations in the community.' " Appellant's Brief at 28 (citing *Roth*, 408 U.S. at 573. Homar may only prevail on this claim if he can demonstrate that the government "create[d] and disseminate[d] a false and defamatory impression about [him] in connection with his termination." *Codd v. Velger*, 429 U.S. 624, 628 (1977) (per curiam). *See also Bishop v. Wood*, 426 U.S. 341, 348-49 (1976).

Homar contends that ESU's disclosure of its investigation into his activities in a small article that appeared in the Pocono Record newspaper,[8] coupled with his subsequent demotion, implicated his liberty interest. We disagree. The article in the newspaper did not disclose any specifics regarding the nature of ESU's concern, nor did it disclose information about the disciplinary action ESU contemplated. Furthermore, the article appeared prior to his demotion, and there is no evidence to indicate that ESU publicly disclosed the outcome of its investigation or the fact that it demoted Homar to groundskeeper. We accordingly find that Homar has no liberty interest claim. *See Tucker*, 868 F.2d at 82 (holding that no liberty interest was implicated when press release about discharge of police officers was not misleading).

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[8] The text of the article, which appeared on the September 3, 1992 edition of the paper, reads as follows:

> East Stroudsburg University should decide by next week whether to reinstate suspended ESU police officer Richard J. Homar.
>
> Charges were dropped Tuesday against Homar, 26, after District Justice Charles Eyer ruled their [sic] wasn't enough evidence to hold him for trial. Homar had been charged with possession and delivery of marijuana and criminal conspiracy.
>
> Jerry Levanowitz, ESU's director of Human Resources, said the university is still conducting its investigation. "The dropping of the charges has been noted," he said.
>
> Once the investigation is completed a due process hearing will be held for Homar and a decision will be rendered, Levanowitz said.
>
> Last week, state police arrested Homar, an ESU officer for about six months, and two other men for allegedly conspiring to sell marijuana.

App. at 213.

B.

Homar further alleges that ESU violated his liberty interest because it imposed "a stigma ... that foreclosed his freedom to take advantage of other employment opportunities." *Roth*, 408 U.S. at 573. Yet Homar has proffered no evidence to suggest that the disciplinary actions taken by the university had in any way foreclosed other employment opportunities.[9] Indeed, Homar testified at his deposition that he had not sought out a position with any other employer since his demotion. App. at 50. Furthermore, as noted above, Homar makes no allegations that any information in the newspaper article was untrue; the university never even publicly disclosed that Homar was terminated from his job as police officer. Under such circumstances, we cannot find that Homar's liberty interest was implicated. *Tucker*, 868 F.2d at 83.

Accordingly, we affirm the district court's issuance of summary judgment as to this issue.

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[9] Homar testified during his deposition that, prior to his arrest he had applied for two part-time jobs for which he was not hired. App. at 97, 102. No evidence was proffered, however, to indicate that his arrest was the reason he was not offered these jobs.

VI.

For the foregoing reasons, we affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

ALITO, *Circuit Judge*, concurring in part and dissenting in part.

I write separately for two reasons. First, I would hold, based on the undisputed facts of this case, that the university's suspension of Homar without pay and without a hearing did not violate the principles of procedural due process as interpreted by the Supreme Court. I thus dissent from section III.A of the majority's opinion. Second, although I do not disagree with the majority's decision to remand the substantive due process question to the district court, I wish to set forth my own views on that issue.

I.

A. Due process does not always require a pre-suspension hearing. *See, e.g., FDIC v. Mallen*, 486 U.S. 230, 240-41 (1988); *Barry v. Barchi*, 443 U.S. 55, 63-66 (1979). In *Mallen*, the Supreme Court observed that "[a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Id.* at 240 (citations omitted); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) ("[T]he timing and nature of the required hearing 'will depend on appropriate accommodation of the competing interests involved. These include the importance of the private interest and the length or finality of the deprivation, the likelihood of governmental error, and the magnitude of the governmental interests involved.") (citations and footnote omitted). In my view, this exception should apply here. *See, e.g., Ambus v. Granite Bd. of Educ.*, 975 F.2d 1555, 1562 (10th Cir.1992), *aff'd as modified on other ground*, 995 F.2d 992 (10th Cir.1993) (en banc).

Under the particular circumstances of this case, a pre-suspension hearing was not, in my view, essential. Within a few hours of the August 26, 1992, drug raid that resulted in Homar's arrest, the university learned that Homar had been charged with possession of marijuana, possession with intent to deliver marijuana, and criminal conspiracy. Homar did not report to work on August 26 for his 4:00 p.m. to 12:00 p.m. shift. The next day, Homar called his police chief to say that he had been arrested and to ask whether he was suspended. Homar was informed that he was suspended, and this was confirmed by letter delivered the same day.[1]

I do not think that the university violated Homar's right to procedural due process when it suspended him from his position as a campus police officer after learning that he had been arrested and charged with drug violations. There was probable cause to support the criminal charges and hence a substantial assurance that the deprivation was not baseless or unwarranted. The university was certainly entitled to take the position that Homar could not be permitted to work as a campus police officer with such charges outstanding, and there was thus, as the majority concedes, a compelling government interest present. And the university needed to act promptly. The majority admits all of this but finds that the university had to suspend Homar with pay. I find no requirement that in such circumstances a public employer must pay its suspended employees.

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[1] As I discuss further, *infra*, given Homar's immediate admission of his arrest, I am at a loss as to what purpose a pre-suspension hearing would have served in this case. *See generally Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (one factor to consider in determining what due process requires is the probable value, if any, of additional procedural safeguards).

B. In reaching its conclusion to the contrary, the majority declares that "a governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing." Majority Opinion, at 12. The majority essentially announces a blanket rule that a public employer that wishes to suspend an employee--even an employee in a public-safety position who has been charged with multiple felonies--must either provide a pre-suspension hearing or suspend the employee with pay. This holding is based on one sentence of dictum from *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 544-45 (1985), the Eleventh Circuit's reliance on that dictum in *Everett v. Napper*, 833 F.2d 1507, 1512 (11th Cir.1987), and this court's opinion in *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064 (3d Cir.1990). These bases do not, in my view, withstand scrutiny.

With regard to *Loudermill*, I note that the Supreme Court there expressly recognized that "[t]here are, of course, some situations in which a postdeprivation hearing will satisfy due process requirements." *Loudermill*, 470 U.S. at 542 n. 7 (citations omitted). It is of course true, as the Court later notes, that an employer can avoid any due process problems associated with keeping a dangerous employee on the job by suspending the employee with pay, *id.* at 544-45, "for then there is not a deprivation." *Bailey v. Board of County Commissioners of Alachua County*, 956 F.2d 1112, 1124 n. 13 (11th Cir.), *cert. denied*, 506 U.S. 832 (1992). But as the Federal Circuit has explained, this "is merely descriptive, not normative. We agree that in the instant case, the government could have suspended with pay. Nevertheless, we cannot read *Loudermill* as holding that the government must suspend him with pay." *Engdahl v. Department of Navy*, 900 F.2d 1572, 1578 (Fed.Cir.1990). I agree.

The Eleventh Circuit's decision in *Everett*, which was issued before the Supreme Court's decision in *Mallen*, simply relies on the *Loudermill* dictum. Numerous courts of appeals have reached a contrary conclusion regarding the import of *Loudermill*, particularly after *Mallen*. *See Jones v. City of Gary*, 57 F.3d 1435, 1441-45 (7th Cir.1995) (no pre-suspension hearing required where firefighter was suspended without pay; plaintiff's property interests were adequately protected by post-deprivation hearing); *id.* at 1445-46 (Ripple, J., concurring) ("there are circumstances in which the need for swift action on the part of those who exercise governmental authority and responsibility for the safety and security of others can justify the elimination or truncation of even the bare-bones pretermination hearing required by *Loudermill*") (citations omitted); *Chaney v. Suburban Bus Div. of the Regional Transp. Auth.*, 52 F.3d 623, 628 (7th Cir.1995) (plaintiff bus driver suspended without pay after bus hit and injured pedestrian; no pre-suspension hearing necessary as employer's interests "clearly outweigh[ed]" those of plaintiff); *Ambus v. Granite Bd. of Educ.*, 975 F.2d 1555, 1562 (10th Cir.1992) (court discussed *Loudermill* but applied the *Mallen* exception where a teacher was suspended without pay and without a hearing after the school learned that the teacher had been arrested on drug charges; court stated that "the substantiated knowledge that a teacher had been arrested for drug sales raised a substantial government interest justifying immediate suspension without pay"), *aff'd as modified on other ground*, 995 F.2d 992 (10th Cir.1993) (en banc); *Strong v. Board of Educ. of Uniondale Union Free School Dist.*, 902 F.2d 208, 212 (2d Cir.) (citing *Loudermill* and *Mallen*, court concluded that, on balance, no pre-termination hearing required; court stressed that probable value of hearing was not very great because parties were well aware of each other's assertions), *cert. denied*, 498 U.S. 897 (1990); *see also Richardson v. U.S. Customs Service*, 47 F.3d 415, 418-19 (Fed.Cir.1995) (discussing 5 U.S.C. § 7513(b)(1)) ("[A]n indictment for a crime for which a sentence of imprisonment may be imposed will, as a general rule, provide reasonable cause for an agency to believe that the employee has committed such a crime, and, when the nature of the crime alleged relates to the employee's ability to perform his or her duties, an agency may summarily suspend the employee, without pay, pending the outcome of the criminal proceedings.") (citations omitted); *Bailey v. Board of County Commissioners of Alachua County,* 956 F.2d 1112, 1123-24 & n. 13 (11th Cir.) (qualified immunity) (stressing flexibility of standard regarding necessity of pre-deprivation hearing where prison guard was suspended without pay upon his arrest), *cert. denied*, 506 U.S. 832 (1992); *Gamble v. Webb*, 806 F.2d 1258, 1261 (5th Cir.1986) (relying upon *Loudermill*'s statement that " 'there are, of course, some situations in which a post-deprivation hearing will satisfy due process,' " and concluding, under *Logan* balancing test, that "the present one is such a situation") (quoting *Loudermill*, 470 U.S. at 542 n. 7) (brackets omitted). All of these decisions--like the Supreme Court's procedural due process cases in general and unlike the majority's blanket rule--reflect a balancing of interests based on the particular circumstances of each case.

I also believe that the majority has misinterpreted our opinion in *Bradley*. Citing *Bradley*, 913 F.2d at 1077, the majority states that *Bradley* implies that suspension without pay and without a pre-suspension hearing always violates due process. Majority Opinion, at 11-12. However, on the next page of the *Bradley* opinion, the panel clearly stated:

> We need not decide in this case whether Bradley was entitled to a pre-suspension hearing, as he contends, or whether a post-suspension hearing sufficed. *Compare Loudermill*, 470 U.S. at 544, 105 S.Ct. at 1494

> (because government's interest in immediate termination of security guard who had lied when seeking employment did not outweigh employee's interest in retaining employment, pre-termination hearing was required) *with FDIC v. Mallen*, 486 U.S. 230, 108 S.Ct. 1780, 1787-88, 100 L.Ed.2d 265 (1988) (because government had substantial interest in suspending indicted bank official to protect bank and depositors, a post-suspension hearing within a reasonable time was sufficient).
>
> Bradley received no hearing, either before or after the suspension, and hence if he was suspended, as the record suggests, he was deprived of due process.

913 F.2d at 1078. In my view, far from implying anything, the *Bradley* panel expressly reserved decision on the issue presented in this case.[2]

I would resolve that issue in this case by following the great weight of federal appellate authority cited above and holding that whether a pre-suspension hearing was required in this particular case requires a balancing of the relevant factors.

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[2] The majority also defends its reliance on *Bradley* by characterizing the *Loudermill* dictum and the *Mallen* exception as one and the same. *See* Majority Opinion, at 11 & n.3. I do not agree with this assessment. *Loudermill* states that an employer may satisfy due process by suspending an employee with pay. That was not done in *Bradley*, and so the district court's reliance on the *Loudermill* dictum was rightly held to be improper. But defendants in *Bradley*--like defendants in this case--argued separately that they came within the independent *Mallen* exception--pursuant to which pay is not required--and that a pre-suspension hearing thus was not necessary. We did not decide whether *Mallen* excused the need for a pre-suspension hearing because Bradley did not receive even a post-suspension hearing. I see nothing "inconsistent" in *Bradley*, nor do I read *Bradley* as "necessarily [ ] reject[ing]" the possible adequacy of a post-suspension hearing in circumstances like those here.

For the reasons already expressed above, I would hold that in the circumstances of this case, a pre-suspension hearing was not required and that a post-suspension hearing within a reasonable time after the suspension was sufficient. It may be that the university failed to conduct a sufficiently prompt or adequate post-suspension hearing after the criminal charges were dismissed on September 1, 1992, but that is a different question. Moreover, as in *Strong*, I am not sure how a pre-suspension hearing on August 26, 1992, would have made any difference. The only fact important to the university's decision was whether Homar had been arrested and charged. Homar did not dispute this, and in fact confirmed it the next day; Homar was well aware of the reasons for his suspension. As in *Strong*, the hearing required by the majority would have been "an empty formality." *See Strong*, 902 F.2d at 212.

C. I have one final problem with the section of the majority opinion dealing with the need for a pre-suspension hearing. The majority assumes that an important government interest requiring prompt action is what permits an employer to suspend an employee without a pre-suspension hearing but with pay. I think that this is inaccurate. It is my understanding that a public employer may generally suspend a public employee for cause, with pay, and without a hearing--even absent an emergency situation--because such a suspension does not ordinarily implicate any constitutionally protected property interest. *See, e.g., Hicks v. City of Watonga*, 942 F.2d 737, 746 n. 4 (10th Cir.1991) ("[N]o property interest was infringed at Mr. Hicks' first round of hearings when he was suspended and then reprimanded. Mr. Hicks suffered no loss in pay because of the pre-hearing suspension. Suspension with pay does not raise due process concerns.") (citations omitted); *Pitts v. Board of Educ. of U.S.D. 305, Salina, Kansas*, 869 F.2d 555, 556 (10th Cir.1989) (same); *see also Hardiman v. Jefferson County Bd. of Educ.*, 709 F.2d 635, 637-38 & n. 2

(11th Cir.1983) (not deciding but questioning whether suspension with pay could ever constitute deprivation of property interest, and opining that "bad-faith" suspension with pay might infringe liberty interest); *Koelsch v. Town of Amesbury*, 851 F.Supp. 497, 500 (D.Mass.1994) ("A public employee's suspension with pay does not implicate a constitutionally protected property interest.") (citations omitted). Under the majority's reasoning, the important government interest requiring prompt action is rendered a nullity because it simply allows the employer to do what it could do in a typical non-emergency, for-cause suspension situation, i.e., suspend the employee with pay.

II.

Although I do not disagree with the majority's determination that a remand is in order on Homar's substantive due process claim, I write separately to set forth my views on the viability of that claim. I do not think that a plaintiff has a substantive due process claim for a non-legislative deprivation of a state-created property right by a public employer. Moreover, if Homar has a substantive due process claim in this context, it seems to me that he must show that the employer's actions were not rationally related to a legitimate government interest; mere allegations of bad faith cannot suffice.

A. Neither the Supreme Court nor this court has previously held that a plaintiff has a substantive due process claim for a non-legislative deprivation of a state-created property interest by a public employer. The Eleventh Circuit recently overruled a decade of its own decisions recognizing such claims. *McKinney v. Pate*, 20 F.3d 1550 (11th Cir.1994) (en banc), *cert. denied*, 115 S.Ct. 898 (1995); *see also Rivkin v. Dover Twp. Rent Leveling Bd.*, 671 A.2d 567 (N.J. 1996). Essentially for the reasons stated in *McKinney*, which I find persuasive, I believe that Homar's allegations state only procedural due process claims.

In *McKinney*, the Eleventh Circuit considered the following issue: "whether, under the Fourteenth Amendment, a government employee possessing a state-created property interest in his employment states a substantive due process claim, rather than a procedural due process claim, when he alleges that he was deprived of the employment interest by an arbitrary and capricious non-legislative government action." *Id.* at 1553. Sitting en banc, a unanimous Eleventh Circuit answered "no," and in an effort to bring its cases back into line with Supreme Court precedent, overruled a decade of its prior decisions.[3] The court held that "in non-legislative cases, only procedural due process claims are available to pretextually terminated employees." *Id.* at 1560; *see also Rivkin*, 671 A.2d at 577 (plaintiffs' purported substantive due process claim "is much closer to a procedural due process claim" in that it "amounts to an allegation that the State failed to furnish an impartial tribunal, which 'is a matter of procedural, not substantive, due process' ") (citations omitted).

Two aspects of the Eleventh Circuit's opinion in *McKinney* bear emphasis here. First, the court concluded that allegations of arbitrary and capricious action by governmental employers affecting an individual's property interest in public employment "will not make out a substantive due process claim under the jurisprudence of the Supreme Court ... because only *procedural* issues are implicated." *Id.* at 1559 (emphasis in original); *see also id.* at 1561 ("McKinney's allegation is procedural: the County failed to provide one of the elements of procedural due process--an unbiased decisionmaker.").[4] I agree, as I discuss further below.

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[3] Those prior cases, like the test advocated by Homar, essentially required that a public employee show the deprivation of a property right in public employment for improper, pretextual, or arbitrary and capricious reasons.

Second, crucial to the court's decision was the distinction between legislative acts and non-legislative or executive acts. Executive acts, such as employment decisions, typically apply to one person or to a limited number of persons, while legislative acts, generally laws and broad executive regulations, apply to large segments of society. *Id.* at 1557 n. 9. The court criticized its prior decision in *Hearn v. City of Gainesville*, 688 F.2d 1328 (11th Cir.1982)--its first case to apply substantive due process analysis to an arbitrary termination claim--because "[i]n that case, where a terminated employee challenged an executive act, we cited *Nebbia [v. New York*, 291 U.S. 502 (1934)], where a legislative act (to wit, a law) was at issue." *Id.* at 1558 n. 14. The court added that "[i]t is imperative that a stricter segregation of these two distinct case-categories be maintained." *Id.* The court indicated that rational basis review under the substantive component of the Due Process Clause is appropriate only in the context of challenges to legislative action. *Id.* at 1557-58 & nn. 9 & 14; *see also TRM, Inc. v. United States,* 52 F.3d 941, 945 & n. 17 (11th Cir.1995) (applying rational basis review to substantive due process challenge to regulation under Food Stamp Act and noting that "[t]his standard is not affected by our decision in *McKinney* " because "[t]he holding of that case was specifically limited to substantive due process challenges to non-legislative acts") (citations omitted); *Sullivan Properties, Inc. v. City of Winter Springs,* 899 F.Supp. 587, 594-96 (M.D.Fla.1995) (considering the impact of *McKinney* on substantive due process challenges in the area of zoning and the granting of building permits; concluding that there is a "substantive due process cause of action for arbitrary and unreasonable zoning ordinances" but not for "substantive due process claims [challenging] executive acts granting or denying a particular building permit application").[5] I again agree.

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[4] I note that the Supreme Court has never held that a public employee has a substantive due process right to be free from arbitrary or capricious conduct adversely affecting the employee's property interest in that employment.

Like the prior decisions in the Eleventh Circuit, a decision allowing Homar to maintain a substantive due process claim based on an allegation of bad faith would elevate Homar's procedural challenges to substantive due process status. Assuming that there is a factual issue regarding whether defendants acted in bad faith, I question the wisdom of recognizing a substantive due process claim where a university fails to provide adequate procedural due process and where the way in which procedural due process is denied could give rise to an inference of bad faith. This sort of "substantive procedural due process claim" is precisely what troubled both the Eleventh Circuit in *McKinney* and a unanimous New Jersey Supreme Court in *Rivkin*, and I would not recognize such a claim. It seems to me that Homar's claim is clearly procedural and should be recognized as such.

Further, the cases upon which Homar relies essentially derive--as is discussed more fully below--from *Pace Resources, Inc. v. Shrewsbury Tp.*, 808 F.2d 1023 (3d Cir.), *cert. denied*, 482 U.S. 906 (1987), and *Rogin v. Bensalem Tp.*, 616 F.2d 680, 689 (3d Cir.1980), *cert. denied*, 450 U.S. 1029 (1981), both of which involve challenges to zoning ordinances and thus challenges to legislative acts. The cases that have applied *Pace Resources* and *Rogin* in challenges to non-legislative acts have, in my view, fallen into the trap identified by the Eleventh Circuit in *McKinney*. I would not extend them into the public employment setting.

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[5] See also *Kauth v. Hartford Ins. Co. of Illinois*, 852 F.2d 951, 956-58 (7th Cir.1988) (plaintiff alleged not that statute or regulation was unconstitutional but that sheriff arbitrarily ignored law in seizing property; court found that "in cases where the plaintiff complains that he has been unreasonably deprived of a state-created property interest, without alleging a violation of some other substantive constitutional right or that the available state remedies are inadequate, the plaintiff has not stated a substantive due process claim") (citations omitted).

B. Assuming for the sake of argument that there is a substantive due process claim for arbitrary and capricious non-legislative actions by public employers and that Homar's interest in his position as a campus police officer constituted a "property" interest for substantive due process purposes,[6] I nonetheless conclude that Homar seeks application of the wrong standard in evaluating his claim. Under true rational basis review--which is the most that Homar is entitled to where he is asserting the violation of a non-fundamental, state-created property interest--I think that Homar failed to create a fact issue as to whether the university violated his substantive due process rights.

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[6] *But see, e.g., Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J.,concurring) ("As the Court correctly points out, respondent's claim to a property right is dubious at best. Even if one assumes the existence of a property right, however, not every such right is entitled to the protection of substantive due process. While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, substantive due process rights are created only by the Constitution."); *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 598-601 (3d Cir.) ("to state a substantive due process claim, a plaintiff must have been deprived of a particular quality of property interest"), *cert. denied*, 116 S.Ct. 352 (1995); *Reich v. Beharry*, 883 F.2d 239, 243-44 (3d Cir.1989) ("While, as we have discussed above, it is well settled that state-created property interests, including some contract rights, implicate the protection of the procedural aspect of the due process clause, the issue of whether and when state-created property interests invoke substantive due process concerns has not been decided by the Supreme Court and is subject to varying analyses and conclusions by the lower courts.... [We have] acknowledged that what constitutes a property interest in the procedural due process context might not constitute one in that of substantive due process.... [I]n this circuit, at least, not all property interests worthy of procedural due process protection are protected by the concept of substantive due process.") (citations omitted); *Ransom v. Marrazzo*, 848 F.2d 398, 411-12 (3d Cir.1988) ("Substantive due process refers to and protects federal rights. The provision of water and sewer services, whether by a municipality or by a private utility company, is not, however, a federally protected right. The legal fact that, once a municipality (or, for that matter, a private utility company) establishes a utility for its citizens, a citizen's expectation of receiving that service rises to the level of a property interest cognizable under the Due Process Clause, merely brings that expectation within the compass of the Fourteenth Amendment's procedural protections.... It does not transform that expectation into a substantive

The appropriateness of summary judgment as to Homar's substantive due process claim requires consideration of what Homar must show to establish a substantive due process violation. Homar argues that our cases hold that a plaintiff can establish a substantive due process violation by proving that the government's actions were motivated by bias, bad faith, or improper motive. Homar contends that a public employee who suffers an adverse employment decision may maintain a substantive due process claim against the public employer by showing (1) that the employer's actions were not rationally related to a legitimate government interest or (2) that the employer's actions were motivated by (a) bias, (b) bad faith, or (c) improper motive. I do not agree.

First, as I alluded to above, we have never applied this test in the public employment context, and I would not extend this test to this context, whatever its appropriateness in other contexts. Further, it seems to me that the statements in our opinions regarding the nature of rational basis review in substantive due process cases have evolved in a strange and, I think, unintended way. Beginning with unobjectionable descriptions of classical rational basis review, our opinions eventually reached the point of suggesting that a plaintiff can state a substantive due process claim merely by alleging that an

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guarantee against the state in any circumstance.") (citations omitted).

individual decision resulting in the deprivation of a property right was taken in bad faith. The Supreme Court has never sanctioned such a broad proposition, and I am confident that this cannot be the law. If a plaintiff like Homar has a substantive due process claim in this context, it seems to me that he must show that the employer's actions were not rationally related to a legitimate government interest and that mere allegations of bad faith cannot suffice.

In *Pace Resources, Inc. v. Shrewsbury Tp.*, 808 F.2d 1023 (3d Cir.), *cert. denied*, 482 U.S. 906 (1987), plaintiff challenged a municipality's land use restrictions on substantive due process grounds. In describing the "narrow review" over zoning ordinances, we quoted our prior decision in *Rogin v. Bensalem Tp.*, 616 F.2d 680, 689 (3d Cir.1980), *cert. denied*, 450 U.S. 1029 (1981):

> " The test for determining whether a law comports with substantive due process is whether the law is rationally related to a legitimate state interest. '[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.' "

808 F.2d at 1034 (quoting *Rogin*, 616 F.2d at 689) (quoting *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955)) (brackets in *Rogin*). We explained that "[a] plaintiff making a substantive due process claim in federal court has the burden of showing that the regulation is arbitrary or irrational. Thus to state a claim, Pace's complaint would have to allege facts that would support a finding of arbitrary or irrational legislative action by the Township." *Id.* at 1035 (citations omitted). After concluding that "Pace's complaint fails to make any factual

allegations that indicate irrationality" and that "Pace does not present a case involving actions aimed at this developer for reasons unrelated to land use planning," we concluded that "[b]ecause it appears on the face of the amended complaint that the Township decisionmakers could have had rational reasons for the decisions contested here and because that complaint alleges no facts suggesting arbitrariness, it fails to state a substantive due process claim upon which relief can be granted." *Id.* at 1035-36 (citation omitted).

In *Bello v. Walker*, we noted the rational basis review articulated in *Pace Resources*, but we focused on the language from *Pace* stating that the plaintiff there did not allege "actions aimed at this developer for reasons unrelated to land use planning." *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir.) (citation omitted), *cert. denied,* 488 U.S. 851 (1988). We thus distinguished *Pace Resources* and announced as follows:

> We need not define, at this juncture, the outer limits of the showing necessary to demonstrate that a governmental action was arbitrary, irrational, or tainted by improper motive. The plaintiffs in this case presented evidence from which a fact finder could reasonably conclude that certain council members, acting in their capacity as officers of the municipality improperly interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits. These actions can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation actionable under section 1983.

Id. at 1129-30 (footnote omitted).

Next, the panel in *Midnight Sessions* paraphrased *Bello* and stated that "a plaintiff may maintain a claim of substantive due process violation upon allegations that the government deliberately and arbitrarily abused its power." *Midnight Sessions, Ltd. v. City of Phil.*, 945 F.2d 667, 683 (3d Cir.1991) (citation omitted), *cert. denied*, 503 U.S. 984 (1992). "Thus, allegations that the government's actions in a particular case were motivated by bias, bad faith, or improper motive ... may support a finding of substantive due process violation." *Id.* (citing *Bello* and *Pace Resources*).

In *Parkway Garage, Inc. v. City of Phil.*, 5 F.3d 685, 692 (3d Cir.1993), we explained that "[s]ubstantive due process protects citizens from arbitrary and irrational acts of government." *Id.* at 692 (citing *Rogin v. Bensalem Tp.*, 616 F.2d 680, 689 (3d Cir.1980), *cert. denied*, 450 U.S. 1029 (1981)).[7] We then stated the following test (which is the test quoted by the parties in this case): "A violation of substantive due process rights is proven: (1) if the government's actions were not rationally related to a legitimate interest; or (2) 'if the government's actions in a particular case were in fact motivated by bias, bad faith or improper motive.' " *Id.* (citation omitted); *see also Blanche Road Corp. v. Bensalem Tp.*, 57 F.3d 253, 263 (3d Cir.), *cert. denied*, 116 S.Ct. 303, 133 (1995).

From *Rogin* to *Parkway Garage*, then, we have moved from inquiring merely whether a legislative act survived pure rational basis review to inquiring whether actions by specific defendants vis-a-vis a specific plaintiff were somehow improper. It seems to me that our cases began looking to governmental conduct that might prove a lack of rational basis, but we have now set forth an entirely separate test for evaluating substantive due process claims that is independent of standard rational basis review. *See also Rivkin*, 671 A.2d at 576-77 (declining to follow *DeBlasio* and *Bello* and stating that "[i]t is a mistake ... to equate the concept of 'arbitrary and irrational' governmental land use decisions with the substantive component of the Due Process Clause of the Fourteenth Amendment"). In my view, the court should take the next available opportunity to clarify that the appropriate test is true rational basis review.[8]

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[7] *Rogin* presents, in my view, the proper scope of substantive due process review. There, we found that the township "has a legitimate interest in controlling population growth and density and the zoning amendments are a rational and reasonable means to accomplish that purpose. Therefore, the zoning amendments were not arbitrary or irrational...." *Id.* I find nothing in *Rogin* to support the broad proposition that substantive due process protects citizens in general from arbitrary and irrational acts of government.

If we are to recognize substantive due process claims in the public employment context--which, for the reasons discussed above, I think would be a mistake--then, in my view, we should ask merely whether the plaintiff can show that the employer's actions were not rationally related to a legitimate government interest. It should not be enough to allege bad faith by a single governmental actor; the overall conduct complained of must be unrelated to any legitimate governmental interest. If this mode of analysis is applied to this case, I think that it is clear that the university's actions were rationally related to its legitimate interests, and, indeed, Homar does not contend otherwise.

C. In sum, substantive due process applies where there is a fundamental right at stake or legislation is challenged as having no rational relationship to any legitimate government interest. Here, plaintiff suggests no fundamental right within the meaning of the substantive component of the Due Process Clause; nor is plaintiff challenging a legislative act on rational-basis grounds. In my view, then, plaintiff has no substantive due process claim on the undisputed facts presented.[9]

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[8] I note that some district court opinions in this circuit have recognized the mixed signals sent by this court. For example, in *Ersek v. Township of Springfield*, 822 F.Supp. 218 (E.D.Pa.1993), a public employment case, the court opined that *Bello* and *Pace Resources* do not apply outside of the building and zoning permit contexts. *Id.* at 221 (dicta).

III.

For the foregoing reasons, I respectfully dissent from the majority's conclusion, set forth in section III.A, that Homar had a right to a hearing prior to his suspension. Although I join in section IV of the opinion remanding the substantive due process issue to the district court, I do not believe that Homar's substantive due process claim should survive a motion for summary judgment on remand.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[9] I also note the Supreme Court's consistent instruction that the substantive component of the Due Process Clause be narrowly construed. *E.g.*, *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.") (citation omitted); *see also Fagan v. City of Vineland*, 22 F.3d 1296, 1306 n. 6 (3d Cir.1994) (en banc) ("We cannot ignore the Supreme Court's repeated warnings against an overly generous interpretation of the substantive component of the Due Process Clause.").

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD J. HOMAR, :
:
Plaintiff :
: CV-93-0852
v. :
: JUDGE VANASKIE
JAMES E. GILBERT, et al., :
:
Defendants :

MEMORANDUM

The Fourteenth Amendment to the Constitution protects against the deprivation of liberty and property without due process of law. In Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), the Supreme Court held that a public employee who enjoys a protectible property interest in his position may not be terminated without written or oral notice of the charges against him, an explanation of the employer's evidence, and an opportunity to respond.

Plaintiff Richard J. Homar, a former East Stroudsburg University ("ESU") police officer who was arrested and charged with various drug offenses, alleges that ESU and certain of its employees –defendants here –denied him due process when they suspended him without affording him notice and an opportunity to be heard prior to the suspension. Homar also contends that the Defendants denied him procedural and substantive due process when, after conducting an internal investigation of the drug charges and his activities, the Defendants demoted Homar to the position of ESU groundskeeper, which was Homar's position prior to becoming a campus police officer. The demotion became effective following Homar's meeting with the individual who held ultimate authority regarding his employment status with ESU --Defendant James Gilbert, ESU's President.

Pending is Defendants' motion for summary judgment. Although Homar was initially suspended without pay, within thirty (30) days of his suspension Defendants agreed to pay Homar all of the wages he would have received as a police officer during the suspension period. Consequently, because he lost no salary due to the suspension and because Defendants did not terminate him, Homar suffered no compensable due process violation as a consequence of the suspension. See Hicks v. City of Watonga, 942 F.2d 737, 746 n. 6 (10th Cir. 1991) ("[s]uspensoin with pay does not raise due process concerns"); Pitts v. Board of Educ. Of U.S.D. 305, Salina, Kansas, 869 F.2d 555, 556 (10th Cir. 1989) (suspension of public employee with pay does not infringe any measurable property interest); Watkins v. McConologue, 820 F.Supp. 70, 72 (S.D. N.Y.), aff'd mem., 978 F.2d 706 (2nd Cir. 1992). Furthermore, even a suspension without pay would not have violated Homar's due process rights.

Nor did the Defendants fail to provide requisite process in connection with Homar's demotion. Homar was accorded the opportunity to respond to all charges against him before the demotion became effective, which was all the process that is required by Loudermill. Finally, Homar's suspension and demotion did not infringe his substantive due process rights, nor result in an unconstitutional deprivation of a protected liberty interest. Accordingly, defendants' summary judgment motion will be granted.

I. FACTUAL AND PROCEDURAL BACKGROUND.[1]

Homar was arrested by state police in a drug raid at the apartment of James Compton in Monroe County, Pennsylvania, on the morning of August 26, 1992. A local newspaper reported the state police's drug arrests, in pertinent part, as follows:

> Police said Joseph Habhab of Tannersville and his family were at the core of the high-level distribution ring, which obtained 50 to 100 pounds of marijuana every few weeks from Mexico through Texas.
>
> * * *
>
> State police Sgt. Richard Morris said investigators found much of the marijuana was sold in the areas of East Stroudsburg University . . . . [Article attached to Dkt. Entry #28.]

In the early afternoon of August 26, the state police called David Marazas, ESU's Police Chief, to inform him of Homar's arrest and the charges against him. Those charges included possession of marijuana, possession with intent to deliver, and criminal conspiracy to violate the controlled substance law, which is a felony.

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[1] Defendants filed a statement of material facts (Dkt. Entry #19) to which Homar responded (Dkt. Entry #22).

By mid-afternoon Marazas brought the information to the attention of Gerald Levanowitz, ESU's Director of Human Resources, who was the ESU official to whom President Gilbert had delegated authority to discipline and suspend ESU employees. After meeting with Marazas, Levanowitz decided to suspend Homar immediately, without pay. (See Marazas Aug. 26 notes, attached to Ex. "13," Dkt. Entry #28.) Levanowitz did not conduct a pre-suspension hearing or provide Homar an opportunity to argue against his suspension. Levanowitz, however, did issue a suspension letter. (Letter attached to Dkt. Entry #25.)

Because Homar worked the second shift at ESU, he was to report for duty at 4:00 p.m. on August 26. He did not report to work that day.

The day after his arrest, on August 27, 1992, Homar called to tell Marazas that he had been arrested and to ask if he was suspended. (See Marazas Aug. 26 notes, attached to Ex. "13" dkt. Entry #28.) Marazas informed Homar that he was suspended and told Homar that he would deliver Levanowitz's suspension letter to him later that day. (Id.) The letter advised of the suspension pending further investigation and disposition of the criminal charges, but explained that ESU's ultimate decision in the matter would not necessarily coincide with disposition of the criminal charges.

On the same day (August 27), a Pennsylvania state trooper prepared a supplemental report describing his interview with Homar the previous day at 2:00 p.m. The supplemental report stated:

> HOMAR related that he started to hang

> around COMPTON around January of 1992. Joseph HABHAB would come to COMPTON'S residence and that is how he (HOMAR) knows HABHAB. HOMAR knew that COMPTON and HABHAB were dealing in marijuana. HOMAR related that originally he knew that HABHAB and COMPTON were dealing in small amounts but since about January of 1992 he knew that they were dealing in large amounts of marijuana and that they were bringing the marijuana in from Texas. HOMAR further related that HABHAB had given him marijuana joints in the past for his personal use. [Report attached to Dkt. Entry #25.]

The report indicated that Homar "signed a waiver of his rights form."

During his deposition, Homar denied saying the substance of the statements attributed to him in the supplemental report. Homar explained:

> I feel they -- Larry Gerrard, the officer that was with me, was trying to confuse me at the time to make these statements --something like this. This isn't what I said myself, he was trying to persuade me. [Dkt. Entry #25 at 29.]

Homar addressed some of this confusion by explaining, for instance, that he did not have knowledge that marijuana was being imported from Texas: "I only stated that I knew . . . that his brother . . . lived in Texas and that he went to visit him." (Dkt. Entry #25 at 29.) Homar also contested that he stated that Habhab had given him marijuana joints for personal use. (Id.) Regarding his relationship with Compton, Homar explained that, as opposed to the supplemental report's version that Homar knew Compton since 1992, he actually knew Compton "before high school and I was involved in high school athletics with him and things like that." (Dkt. Entry #25 at 27.)

Homar explained that on the morning of his arrest he visited Compton's apartment, which is located close to Homar's mother. (Dkt. Entry #25 at 17.) Homar stated:

> I went into his house, his apartment was unlit and I came down to the living room area of his house. I focused my attention on the TV. Jim was sitting on the couch at the time and I was telling him how I was ready to get going; I was in work clothes to do yard work and I just was in a hurry to get that over with. And I went to turn to his kitchen area to get a glass of water. I heard two men come down the hallway in plain, dark clothes and I was pushed to the ground. [Dkt. Entry #25 at 17-18.]

On September 1, 1992, a Pennsylvania state court dismissed the charges against Homar. Levanowitz learned of the dismissal the next day, but continued his own investigation. On September 11, 1992, Levanowitz met with the state police to inquire about Homar's arrest.[2] The state police provided a copy of the supplemental report to Levanowitz and related a far different story of the circumstances surrounding Homar's arrest than maintained by Homar. Levanowitz's notes state:

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[2] Defendants contended in their statement of material facts that "Levanowitz felt he needed to do his own investigation of the events before deciding on the discipline of Homar." (Dkt. Entry #19 at ¶18.) Homar refuted the contention, stating: "This objective belief of Levanowitz . . . would constitute

> Trooper George said that when he entered the Compton residence on August 26, 1992, Mr. Homar was seated on a sofa in the living room of the house. When Trooper George yelled State Police and entered the house, Mr. Homar got up and moved quickly toward the kitchen of the residence. Troopers [sic] George saw a metallic object flashing/flying from Mr. Homar's direction which he thought might be a gun. Then he drew his weapon. Trooper George related that the metallic object later turned out to be a metal plate used for processing and cutting marijuana. Trooper George and Raab told me that there were four marijuana "joints" on a coffee table where Mr. Homar had been sitting and one of the joints was half burned and there was a heavy odor of marijuana smoke in the house. They told me that a search of the premises turned up a triple beam scale, five pounds of marijuana and paraphernalia. [Dkt. Entry #28 at Ex. "1," p. 1.]

On September 15, 1992, Levanowitz called Homar to schedule a meeting for September 18. Levanowitz told

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a jury question." (Dkt. Entry #22 at ¶18.) Despite Homar's framing of the matter, Levanowitz's purported belief does not create a "material fact." Homar's disagreement with other immaterial facts does not preclude adjudication of this case on Defendants' summary judgment motion.

Homar that a union representative would be permitted to attend the meeting with him, but that since, in Levanowitz's opinion, the meeting would be an administrative hearing, Homar did not have a right to have an attorney attend. (Levanowitz Deposition (Dkt. Entry #26) at 42.)

Homar and his union representative, Richard Connell, attended the September 18th meeting with Levanowitz. Connell requested that Homar's attorney be present, and Levanowitz responded that the meeting would have to be postponed because an attorney for ESU also would have to be present. (Dkt. Entry #26 at 52.) The meeting then proceeded without Homar's attorney attending. Homar did not have a copy of the State Police "supplemental report" as of the date of the meeting.

Levanowitz maintains that during the meeting he represented that he "had already done [his] investigation, with the rest of the investigation including talking to the State Police." (Levanowitz Dep. at 48.) Levanowitz also asserts that he represented during the meeting "that the State Police had given me some evidence very serious in nature." (Id.) Homar acknowledged that Levanowitz requested Homar's "side of the story [as] to what happened on August 26, 1992." (Dkt. Entry #22 at § 24.) However, Levanowitz did not divulge the substance of the supplemental report during the meeting. Consequently, Homar was not able to respond to the damaging statements attributed to him in the supplemental report.

Levanowitz issued a letter to Homar dated September 23, 1992, in which Levanowitz demoted Homar to groundskeeper. The letter, in part, stated:

> This is to inform you that you are to be demoted from your position as a Police Officer I in the Campus Police Department to the position of Groundskeeper . . . . This action is effective retroactive to August 26, 1992, and you are to be given back pay to that date at the rate of pay for a Groundskeeper. You are to report to work at 7:00 A.M. on September 24, 1992 at the Facilities Management Office. . . .
>
> This action is being taken as a result of admissions made by yourself to the Pennsylvania State Police on August 26, 1992 that you maintained associations with individuals whom you knew were dealing in large quantities of marijuana and that you obtained marijuana from one of those individuals for your own use. Your actions constitute a clear and flagrant violation of Sections 200 and 200.2 of the East Stroudsburg University Police Department Manual. [Dkt. Entry #25 at Ex. "2" (emphasis in original).][3]

Although in the letter Levanowitz provided Homar with back pay for the suspension period at the rate paid to a groundskeeper, he later provided Homar with a retroactive payment of the difference between the groundskeeper salary and the police officer salary for the suspension period. (Dkt.

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[3] During his deposition, Homar suggested that he was working as a groundskeeper at the time that LEVANOWITZ made the demotion decision. (Dkt. Entry #25 at 45.) It is unclear whether Homar was permitted to work in a non-law enforcement capacity during the period of his suspension.

Entry #19 at ¶ 51; Homar Dep. at 24-25.) Thus, although the letter purported to make the demotion retroactive, it did not take effect until after September 24, 1992. Homar consequently does not claim that he lost pay or benefits during the period of his suspension. (Homar Dep. at 24.)[4]

Before Homar's suspension was to take effect, Homar's union representatives contacted President Gilbert, who had final authority with regard to Homar's status as an ESU employee, to request a meeting to discuss Levanowitz's disciplinary action. They requested the meeting "because we felt that maybe Mr. Levanowitz ws only giving his side of the story and not giving a fair -- he wasn't giving me a fair shake on his conversations with Dr. Gilbert." (Dkt. Entry #25 at 45.) Gilbert arranged a meeting at 2:00 p.m. on September 24th.

Although Levanowitz had not provided Homar with a copy of the supplemental report during their September 18th meeting, Homar was in possession of the supplemental report by the time that th meeting with Gilbert occurred. (Dkt. Entry #25 at 46.) Homar also had Levanowitz's demotion letter, which explained that the information contained in the letter, which explained that the information contained in the supplemental report formed the basis for the demotion decision.

Connell, the union representative who attended the earlier meeting, Dave Pottiger, a union vice president, Homar and Levanowitz attended the meeting with Gilbert. The meeting lasted approximately 30 to 35 minutes. (Gilbert Statement ¶13.) Because Homar and his union representatives were concerned that Levanowitz's private discussions with Gilbert were possibly prejudicial to Homar, they requested that Levanowitz step out of the office during part of the meeting, which he did. (Dkt. Entry #25 at 46.) During his deposition, Pottiger affirmed that Gilbert provided Homar with a full opportunity to respond to the charges and the discipline Levanowitz imposed. (Pottiger Dep. at 22.)

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[4] Although Homar conceded during his deposition that he did not lose benefits, Homar contended in his response to Defendants' statement of material facts that "[i]t is unknown to plaintiff whether any non-salary benefits were affected." (Dkt. Entry #22 at ¶ 10.) Curiously, however, Homar admitted the defendants' very last material fact, stating: "Homar does not claim he lost pay or benefits during the period of suspension." (Dkt. Entry #22 at ¶ 52.)

By letter dated September 24, 1992, Gilbert informed Homar that it was his "decision to sustain the recommendation of Chief Marazas, Director Levanowitz, and Vice President English and your demotion stands as stated in our letter of September 23, 1992." (Plaintiff's Exhibit 16 attached to the Levanowitz Deposition (Docket Entry 26).) Grievance procedures in the collective bargaining agreement covering HOMAR's employment were then utilized to challenge Homar's demotion. Homar's collective bargaining representative was free to present evidence in support of Homar's position. The State System of Higher Education denied the grievance at Step 3 and the Commonwealth's Office of Labor Relations, Bureau of Labor Relations denied the grievance at step 4. Although the union had the right to proceed to arbitration following the denial at Step 4, it elected to withdraw the matter.

Homar filed his suit on June 7, 1993. Defendants filed an answer on September 7, 1993. Defendants subsequently filed their summary judgment motion in January of 1994. Briefing was completed in March of 1994.

This matter is ripe for disposition.

II. DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment should be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R.Civ. P. 56(c). Summary judgment will not lie "if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). There is no issue for trial unless sufficient evidence exists which favors the non-moving party so that a jury may return a verdict for that party. Anderson, 477 U.S. at 249-250.

A fact is "material" if proof of its existence or non-existence would affect the outcome of the lawsuit under the law applicable to the case. Id., at 248. Summary judgment thus should be entered when a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

A. Procedural Due Process

1. Property Interest

The parties do not dispute that Pennsylvania law provided Homar with a protectible property interest in his position as an ESU police officer; they instead dispute whether the process Homar received was constitutional. In that regard, both parties cite Cleveland Board of Education

v. Loudermill, 470 U.S. 532 (1985), in which the Court said:

> A tenured public employee is entitled to pretermination process consisting of oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. Id. at 544, 546 (emphasis added).[5]

Yet Homar was not terminated from the employ of ESU. He instead was temporarily suspended and then demoted. Thus, Homar is not a terminated employee as discussed in Loudermill. It is unclear whether due process protections extend to employment discipline short of termination. Since neither party has addressed the issue, however, it will be presumed that Homar had a protectible property interest in the position of ESU police officer [sic]

2. Homar's Suspension

Homar contends that he was entitled to an opportunity to be heard before he was suspended from his position as an ESU police officer. Assuming that the suspension infringed a protected property interest, it does not follow that Homar was entitled to some form of hearing before the suspension was implemented. See Ceko v. Martin, 753 F.Supp. 1418, 1424 (N.D. Ill. 1990). Both the timing and the nature of the requisite process depends upon an "appropriate accommodation of the competing interests involved." Goss v. Lopez, 419 U.S. 565, 579 (1975). Those competing interests, which necessarily must be assessed in the context of the facts peculiar to each case, include "the importance of the private interest and the length and finality of the deprivation, . . . the likelihood of governmental error, . . . and the magnitude of the governmental interests involved." Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982). See also Loudermill, 470 U.S. at 542. "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." FDIC v. Mallen, 486 U.S. 230, 240 (1988).

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[5] Emphasis is added here to highlight the fact that the notice may be oral. Thus, Homar's technical argument that his rights were violated because the Defendants did not provide him with written notice of the specific allegations upon which the demotion decision was made is unavailing. See Fraternal Order of Police Lodge No. 5 v. Tucker, 868 f.2d 74, 80 n. 5 (3rd Cir. 1989). In a similar vein, Homar's technical argument that the Defendants did not provide him with a copy of the supplemental report is unavailing. (See Dkt. Entry #23 at 15.) Homar admits that he had a copy of the report at the Gilbert meeting.

In this case, the private interest was strong, but the deprivation incident to a suspension was only temporary and of a relatively brief duration (approximately one month). The likelihood of governmental error was slim in that the suspension was based on the undisputed fact that Homar had been arrested when he was found at the location where significant drug-related activities were being conducted. Thus, there was indeed "a substantial assurance that the deprivation [was] not baseless or unwarranted." Mallen, 486 U.S. at 240. Finally, the governmental interest in preserving public confidence in law enforcement was compelling.

Under similar circumstances, suspensions without a prior opportunity to be heard have withstood constitutional challenges. See, e.g., Ceko, 753 F.Supp. at 1425; Sherod v. Wahl, No. 91-7953, 1993 WL 81428 (N.D. Il. Mar. 19, 1993). Cf., Cheathon v. Brinkley, 822 F.Supp. 1241, 1245-46 (M.D.La. 1993) (defendants who immediately suspended plaintiff upon learning of his arrest for accepting bribes entitled to qualified immunity inasmuch as there was no clearly-established right to a pre-suspension opportunity to be heard).[6] As explained in Caine v. Hardy, 943 F.2d 1406, 1412 (5th Cir. 1991), "[n]ot even an informal hearing . . . must precede a deprivation undertaken to protect the public safety." See also Stana v. School District of City of Pittsburgh, 775 F.2d 122, 128 (3rd Cir. 1985) (implying that where "emergency involving the public welfare was at issue," government need not hold hearing prior to termination).

Homar was certainly charged with important law enforcement responsibilities and the preservation of public safety. His arrest on a drug-related charge implicated important governmental interests in maintaining public confidence in our law enforcement agents. Clearly, his immediate suspension upon being arrested did not violate the due process clause of the Fourteenth Amendment.[7]

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[6] The Defendants in the matter sub judice did not raise the defense of qualified immunity in their summary judgment motion, but it may be applicable here.

[7] Contrary to Homar's assertion, our Court of Appeals did not hold in Fraternal Order of Police Lodge No. 5 v. Tucker, 868 F.2d 74 (3rd Cir. 1989), that a police officer is entitled to a hearing before being suspended under any circumstances. In Tucker, the police officers in question had been "suspended with intent to dismiss," which the Third Circuit viewed as "an action . . . tantamount to dismissal." Id. at 79. Thus, the court did not address the question of the timing of a hearing for a temporary suspension as opposed to an immediate termination. Second, the police officers in that case had been "suspended with intent to dismiss" based upon an internal investigation without ever having been charged with any criminal wrongdoing. Thus, that case did not present the "substantial assurance that the deprivation is not baseless or unwarranted" that is present here. Mallen, 486 U.S. at 240. In short, Tucker did not address the question presented here--whether a police officer is entitled to an opportunity to

The fact that Homar was awarded full pay and benefits for the period of suspension also compels entry of judgment in favor of the Defendants on this claim. "Suspension with pay does not raise due process concerns." Hicks v. City of Watonga, Okl., 942 F.2d 737, 746 n.4 (10th Cir. 1991). Accord, Pitts v. Board of Educ. Of U.S.D. 305, Salina, Kansas, 869 F.2d 555, 556 (10th Cir. 1989) (suspension of public employee with pay does not infringe any measurable property interest); Watkins v. McConologue, 820 F.Supp. 70, 72 (S.D. N.Y.), aff'd mem., 978 F.2d 706 (2nd Cir. 1992)(same); Weg v. Macchiarola, 729 F.Supp. 328, 338 (S.D.N.Y. 1990) (same). Indeed, Loudermill explicitly recognized that a suspension with pay while an investigation is pursued to determine whether the employment relationship should be severed was an appropriate course of action to be taken by the employer. 470 U.S. at 545.

That Homar was originally suspended without pay does not warrant a finding that he was deprived of property without due process. At most, he was denied the use of his salary for a very brief period of time. To recognize a cause of action for denial of due process under these circumstances would clearly elevate form over substance.

In Swick v. Chicago, 11 F.3d 85, 87 (7th Cir. 1993), the court observed:

> The maxim de minimis non curat lex retains force even in constitutional cases, even in civil rights cases. Its particular function is to place

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be heard where he or she is suspended after being arrested for significant criminal activity.

> outside the scope of legal relief the sorts of intangible injuries normally small and invariably difficult to measure that must be accepted as the price of living in society rather than made a federal case out of. The injury that results when a person is temporarily deprived of his right to wear a uniform and a badge, to carry a gun, to arrest people, and to carry out other functions of a police officer or other public officer is of this character. [Emphasis added.]

Homar has not articulated any injury accruing as a result of his suspension upon being arrested for drug related charges. Since he clearly could be suspended with pay without implicating due process concerns, and within one month after being suspended he was awarded full pay for the period of suspension, any injury resulting from the failure to provide an opportunity to be heard before the suspension was imposed is surely de minimis. Accordingly, Defendants are entitled to summary judgment on the suspension claim because the alleged deprivation was de mimimis.

3. Homar's Demotion

The primary thrust of Homar's contention that he was denied due process is that his September 18th meeting with Levanowitz did not provide a meaningful pre-deprivation opportunity to respond to the charges upon which Levanowitz ultimately relied in deciding to demote him. Prior to being deprived of a property right enjoyed in a job, a public employee is entitled to a sufficient explanation of the employer's evidence to permit a meaningful response. Tucker, 868 F.2d at 80. This requirement does not mandate that all evidence of a charge or even documentary evidence be provided to the employee; only that such descriptive explanation be afforded as to permit the employee to respond to the allegations giving rise to the dismissal. Linton v. Frederick County Bd. Of County Commissioners, 964 F.2d 1436 (4th Cir. 1992); Tucker, 868 F.2d at 80 (merely advising a discharged officer of drug use complaint did not provide opportunity to rebut the specifics of the allegations of drug use or the underlying evidence). Thus, Homar is correct that his September 18th meeting with Levanowitz did not allow him to make a meaningful response to the damaging information found in the supplemental report. Yet, the meeting with Levanowitz was not Homar's sole pre-deprivation opportunity to respond to the substance of the supplemental report.

As noted above, Homar and two union representatives acting on his behalf met with President Gilbert on September 24 at 2:00 p.m. The significance of the meeting was that Gilbert held ultimate decisionmaking authority regarding whether Homar would remain employed by ESU as a police officer or groundskeeper. The significance of the timing of the meeting was that September 24 was the date Levanowitz allowed Homar to return to work at ESU; the meeting with Gilbert occurred before Homar would have started his evening shift as a police officer should Gilbert have decided to reinstate him to that position. Thus, Homar was not deprived of any work time (or pay) as a police officer by Levanowitz's decision. Indeed, Gilbert's decision that Homar could not return to ESU as a police officer is properly viewed as the point in time when Homar was deprived of his position as an ESU police officer.

In addition to having in his possession Levanowitz's letter which directly referred to the supplemental report, Homar obtained a copy of the report to review prior to the meeting with Gilbert. Homar thus had notice of all charges or allegations upon which Gilbert would make a decision. Homar does not contend that Gilbert did not allow him a sufficient opportunity to respond to the information found in the supplemental report during the meeting, which lasted about thirty minutes. Indeed, Homar's union vice president, who attended the meeting, acknowledged that Gilbert provided a full opportunity to respond. Moreover, reacting to concerns about Levanowitz's presence, Gilbert had Levanowitz leave the meeting to allow Homar the opportunity to influence him outside of Levanowitz's presence.

Homar contends that the meeting with Gilbert came too late. He characterizes the Gilbert session as "a post-deprivation appeal." (Docket Entry 23 at 15). Although Levanowitz had made his decision to demote Homar on September 23, 1992, that decision did not take effect until September 24, 1994 at 4:00 p.m., when Homar's shift as an ESU police officer began. Essentially, therefore, Homar is contending that he was entitled to a pre-decision opportunity to respond to the evidence that would be considered against him.

A similar argument was raised in Chung v. Park, 514 F.2d 382 (3rd Cir.) cert. denied, 423 U.S. 948 (1975). Chung, a college professor, had received a letter informing him that his position at Mansfield State College was being terminated for a number of reasons. After Chung received the termination letter, but before the termination became effective, a hearing was conducted at which Chung was allocated the burden of showing that the termination was arbitrary, capricious or discriminatory. Our Court of Appeals, affirming the entry of judgment in favor of the defendants, ruled that "[a] pre-termination hearing is not a hearing held prior to any decision to terminate, as Dr. Chung suggests, but rather a hearing held prior to a termination of benefits." Id. at 386 n.7. Writing for the unanimous court, Judge Adams explained:

> [Dr. Chung] would have us hold that due process in the present case required that a hearing be held before any decision to terminate was reached by the administration . . .
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> Due process does not impose such restrictions on professional pre-termination proceedings. Unlike some legal rules, due process is protean in nature . . .
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> * * *
>
> [T]he function of the [pre-termination] hearing procedure is to inform the professor of the grounds for his non-retention and to allow him to challenge their sufficiency. [A] post-decision hearing . . . is adequate to satisfy due process. Moreover, the administration of the internal affairs of a college

> and especially the determination of professional competency is a matter peculiarly within the discretion of a college administration.
>
> Due process should not be employed to ensure that this exercise of discretion is "wise" but only that it is not unreasonable, arbitrary or capricious. If the procedure used by the college is adequate to prevent unreasonable, arbitrary or capricious termination decisions, it satisfies due process. The procedure used in this case was sufficient for these purposes. Id. at 386-87.

Accord, Bignall v. North Idaho College, 538 F.2d 243, 246 (9th Cir. 1976); Vance v. Chester County Board of School Trustees, 504 F.2d 820, 824-26 (4th Cir. 1974); Serafin v. Lexington, 547 F.Supp. 1118, 1126 n.1 (D. Neb. 1982), affirmed mem., 716 F.2d 909 (8th Cir. 1983); Keddie v. Pennsylvania State University, 412 F.Supp. 1264, 1271 (M.D. Pa. 1976).[8]

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[8] As noted above, post-demotion procedures were pursued on Homar's behalf. It has been recognized that collective bargaining agreement grievance procedures provide adequate post-deprivation process. See Wallace v. Tilley, 41 F.3d 296, 302 (7th Cir. 1994). In any event, Homar has not requested that this Court direct Defendants to conduct a belated hearing and has not otherwise challenged the adequacy of post-deprivation processes.

Chung has been followed in post-Loudermill cases. For example, in Jackson v. St. Joseph State Hospital, 840 F.2d 1387 (8th Cir. 1988), the court rejected a similar argument to that advanced here, stating:

> Jackson . . . argues that due process was violated because his termination letter indicated that the decision to terminate had already been made. All he was given was an opportunity to convince Dr. Bartulica to change his mind and rescind the termination. Jackson argues that his hearing should have preceded the decision to terminate rather than the effective date of termination.
>
> Due process, however, does not require pre-decision hearings. It only requires an opportunity to be heard prior to the termination of benefits. In the present case, Jackson was given written notice of his termination on February 17, 1983. The reasons for termination were clearly set forth in this letter. Accompanying the notice were statements made by hospital employees explaining Jackson's

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challenged the adequacy of post-deprivation processes.

> inadequacies. And, more significantly, the notice stated that Jackson's termination was not effective until February 28, 1983 and until then he would continue to receive full pay....
>
> From February 17 until February 28 he had the opportunity to present his case and on February 23, 1983 he made a written response to the dismissal letter. Because Jackson was given the opportunity to be heard prior to the termination of his salary, his due process rights were not violated. Id. at 1391.

Accord, Alexander v. Temple University, 1992 U.S. Dist. LEXIS 16803 *8 (E.D. Pa. 1992).

Therefore, assuming that Homar held a protectible property interest in his position as a police officer, Gilbert provided the timely process to which Homar was entitled. Homar had notice of the charges against him, he knew of the evidence Gilbert possessed, and he had an opportunity to respond. The meeting certainly did not need to be structured in any more formal manner than it was, for "[t]he pretermination hearing may be informal so long as it affords the employee an opportunity to make any 'plausible arguments that might . . . prevent [the] discharge." Tucker, 868 F.2d at 79 (quoting Loudermill, 470 U.S. at 544). See Dennison v. County of Frederick, 921 F.2d 50, 55 (4th Cir.

1990) (unscheduled performance review operated as a constitutional pre-termination hearing where employee resigned after supervisor informed employee that he would be placed on probation unless performance improved), cert. denied, 501 U.S. 1218 (1991); Buschi v. Kirven, 775 F.2d 1240 (4th Cir. 1985) (telephone call offering employee opportunity to discuss discharge satisfied pre-termination hearing requirements). Under these circumstances, it cannot be said that Homar was deprived of property in violation of the Fourteenth Amendment's Due Process Clause. Consequently, Defendants merit judgment as a matter of law with regard to this claim.[9]

4. Homar's "Liberty" Interest

Homar's Complaint alleges that the demotion to groundskeeper damaged his standing in the community and continues to stigmatize him, even though he was cleared of criminal charges. (Compl. at ¶¶33, 36.) Homar thus appears to make a claim that the Defendants violated his Fourteenth Amendment right to protection against deprivation of liberty without due process of law.

A public employee has a protectible liberty interest in receiving due process in two circumstances. First, "'[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him.'" Board of Regents v. Roth, 408 U.S. 564, 573 (1972). This interest is violated when, for example, the basis for discharge without due process is that the employee had been "guilty of dishonesty or immorality" which "might seriously damage [the employee's] standing and associations in [the] community." Id. The employee, however, is entitled to due process only when these charges are publicly disclosed by the government entity. See Bishop v. Wood, 426 U.S. 341, 348-49 (1976); Codd v. Velger, 429 U.S. 624, 626-27 (1977).

---

[9] Homar also complains that his due process rights were violated because he was not entitled to have his attorney present at the September 18, 1992 meeting. It appears, however, that Levanowitz would have permitted Homar's counsel to be present provided ESU's lawyer was also in attendance, and that the meeting would have to be adjourned to accomplish that. Moreover, Homar admits that his union contract "is silent as to the right of counsel at disciplinary hearings." (Docket Entry 22 at ¶28.) Homar also does not contend that he requested that counsel be permitted to attend the meeting with Gilbert, at which Homar was represented by two union officials. In any event, due process does not mandate that a public employer permit an employee to have an attorney attend a pre-termination or pre-demotion proceeding. See Wallace v. Tilley, 41 F.3d 296, 301 (7th Cir. 1994).

The second circumstance in which a liberty interest exists, requiring due process, is when the government employer imposes "a stigma or other disability that foreclosed [the employee's] freedom to take advantage of other employment opportunities." Roth, 408 U.S. at 573-74. The effect of the stigma must be more than simply to make the employee "somewhat less attractive to some other employers" in order to amount to foreclosure of future job opportunities. Id. at n. 13.

With regard to both circumstances, Homar fails to proffer evidence "such that a reasonable jury could return a verdict" in his favor. Anderson, 477 U.S. at 248. He does not establish that the Defendants publicly disclosed the basis for his demotion. Furthermore, Homar does not establish that his demotion imposes a stigma upon him which forecloses his opportunities to find other employment. Indeed, Homar, who continued to work as an ESU groundskeeper as of the filing of his brief in opposition to Defendants' motion for summary judgment, does not contend that he even sought other employment. Consequently, Defendants are entitled to judgment on Homar's claim that his "liberty interests" were infringed without due process. See Loudermill, 740 U.S. at 547 n.13; Watkins, 820 F.Supp. at 72; Weg, 729 F.Supp. at 339.

B. Substantive Due Process

Homar and Defendants concur that "[a] violation of substantive due process rights is proven: (1) if the government's actions were not rationally related to a legitimate government interest; or (2) if the government's actions in a particular case were in fact motivated by bias, bad faith or improper motive." Parkway Garage v. Philadelphia, 5 F.3d 685, 692 (3rd Cir. 1993). Homar does not contend that his demotion was not rationally related to a legitimate government interest. Instead, he contends that the record supports a finding of bias, bad faith or improper motive.

The only evidence proffered by Homar on this issue concerns the actions of Levanowitz. The final decision to demote Homar, however, was made by ESU President Gilbert. Homar does not suggest any bias, bad faith or improper motive on the part of Gilbert.

Moreover, the evidence relating to Levanowitz is not sufficient to submit the question of bias, bad faith or improper motive to a jury. For example, Homar contends that evidence of bad faith is shown by his suspension without prior notice or opportunity for a hearing; but as noted above, Homar's arrest on drug-related charges provided ample basis for his suspension without any hearing. Homar also contends that after the charges against him were dismissed made known to Homar prior to his September 18, 1993 meeting with Leanowitz. There is nothing improper about conducting an investigation of a law enforcement officer who has been arrested, even if the charges are ultimately dismissed. Nor would it seem to have been imprudent to poll members of the police department on this issue. And the information on which the demotion decision was premised was disclosed to Homar before his meeting with the University President. Homar also contends that inappropriate conduct is revealed by Levanowitz' statement that Homar did not have a right to legal counsel at the September 18, 1992 [sic] meeting. Not only does it appear that Levanowitz' advice was correct, but it also appears that Levanowitz was willing to postpone the meeting so that both sides could be represented by counsel. No inference of bias, bad faith or improper motive can be discerned from such conduct. Accordingly, Defendants are entitled to summary judgment on Homar's substantive due process claim.

An appropriate Order is attached.[10]

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[10] Paragraph 39 of Homar's Complaint regards the alleged denial of unspecified procedural guarantees set forth in the Pennsylvania state constitution. Inasmuch as Homar may intend to assert a pendent state law claim, Pennsylvania retains its sovereign immunity, 1 Pa. C.S. §2310; Toombs v. Manning, 835 F.2d 453, 457-60 (3rd Cir. 1987), which also shields the Defendants. Poliskiewicz v. East Stroudsburg University, 113 Pa.Cmwlth. 13, 17, 536 A.2d 472, 474 (1988) (ESU is Commonwealth for purposes of sovereign immunity). See also Shoop v. Dauphin County, 766 F.Supp. 1327, 1334 (M.D. Pa.) (Rambo, J.) (1 Pa. C.S. § 2310 also protects Commonwealth employees and officials), aff'd mem., 945 F.2d 396 (3rd Cir. 1991), cert. den., 112 S.Ct. 1178 (1992).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD J. HOMAR,	:
	:
Plaintiff	:
	: CV-93-0852
v.	:
	: JUDGE VANASKIE
JAMES E. GILBERT, et al.,	:
	:
Defendants	:

ORDER

NOW, THIS 17th DAY OF MARCH, 1995, for the reasons set forth in the accompanying Memorandum, **IT IS HEREBY ORDERED THAT:**

1. Defendants' Motion for Summary Judgment (Docket Entry #19 is **GRANTED**.

2. The Clerk of Court is directed to enter judgment in favor of Defendants.

3. The Clerk of Court is directed to close this case file.

Thomas I. Vanaskie
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

JUDGMENT IN A CIVIL CASE

RICHARD J. HOMAR

vs. Case Number:
3:CV-93-0852

JAMES E. GILBERT, Individually
and in his capacity as Pres.
of E.S. Univ., GERALD LEVANOWITZ
Individually and in his capacity
as Director of Human Res. Of E.S.
Univ., DAVID MARAZAS, Individually
and in his capacity as Police Chief of E.S. Univ.,
And CURTIS ENGLISH, Individually and in his
capacity as V.P. of E.S. Univ.

IT IS ORDERED AND ADJUDGED that judgment be and is hereby entered in favor of the defendants, James E. Gilbert, Gerald Levanowitz, David Marazas, and Curtis English, and against plaintiff Richard J. Homar.

March 17, 1996
DATE

MARY E. D'ANDREA
CLERK

JOSEPH F. GAUGHAN
DEPUTY CLERK

Supreme Court, U.S.
FILED
NOV 25 1996
CLERK

②

No. 96-651

In The

Supreme Court of the United States

◆

October Term, 1996

JAMES E. GILBERT, *et al.*,

Petitioners,

vs.

RICHARD J. HOMAR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Lutz Appellate Services, inc.

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Pa. Rule of Criminal Procedure, 143(a) 8

Respondent requests that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the Third Circuit. The Opinion and Order of the Court of Appeals are reported at 89 F.3d 1009 and have been reprinted in the appendix of the Petition at 1a *et seq.* The Opinion and Order of the District Court is not reported, but is reprinted in the Appendix at 47a *et seq.* (For the convenience of the Court, all citations to the Opinions will be to the Opinions attached to the Petition).

STATEMENT OF THE CASE

Respondent respectfully opposes the Petition for Writ of Certiorari which asks the Court to review the holding of the Court of Appeals for the Third Circuit which requires any suspension of a public employee, prior to notice and an opportunity to be heard, to be a suspension with pay. This holding is consistent with the Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Contrary to what is stated in the Petition, the above holding of the Court of Appeals for the Third Circuit is uncontroversal, may be simply applied, and does not impede public officials from acting expeditiously to protect the public and promote public safety.

This case concerns the suspension (and subsequent demotion) of Richard J. Homar ("Homar"), a police officer at East Stroudsburg University ("ESU"), a State University located in East Stroudsburg, Pennsylvania. Homar was arrested on August 22, 1992 during a drug raid which took place at the home of his friend, James Crompton. Pet. App. at 3a. As a result of the raid, Homar was charged with possession of marijuana, possession with intent to deliver and criminal conspiracy. *Id.*

Upon learning of Homar's arrest, ESU's Director of Human Resources, Gerald Levanowitz (hereinafter "Levanowitz"), immediately made a decision to suspend Homar without pay. *Id.* No pre-suspension notice was given to Homar and a pre-suspension hearing was not held. *Id.* The day following his arrest, August 27, 1992, Homar received a letter from Levanowitz notifying Homar that he was suspended without pay. *Id.* The letter indicated that Homar was suspended pending further investigation and disposition of the criminal charges. *Id.*

On September 1, 1992, all criminal charges filed by the State Police against Homar were dismissed after a preliminary hearing. Notwithstanding, the suspension without pay imposed on Homar was not lifted and the University continued with its own investigation. Pet. App. at 4a.

On September 11, 1992, Levanowitz along with two ESU police officers who were assigned to conduct an investigation on Homar, met with two state troopers and a corporal to discuss Homar's case. The meeting took place at the Pennsylvania State barracks. At that meeting, Levanowitz was provided a copy of a page from the Pennsylvania State Police investigative file concerning Homar entitled "Supplemental Report". The report included statements allegedly made by Homar to the State Police in which Homar admitted knowledge of drug dealing by Crompton and another individual named Habhab. This "supplemental report" also contained alleged statements by Homar that he had accepted marijuana for his own use from Habhab while employed at ESU as a police officer. Homar denied ever making any such statements. *Id.*

On September 18, 1992, Homar attended what was referred to by Levanowitz as a "administrative hearing". *Id.* Levanowitz indicated to Homar that the purpose of the hearing was to give him an opportunity to provide any information that would assist him in making a determination concerning any actions that would end his suspension and any other information that would help Homar in presenting his case. Pet. App. at 5a. Levanowitz advised Homar that "the State Police had given [him] evidence very serious in nature", but Levanowitz never disclosed to Homar what the evidence was, or that he had received the supplemental report containing the damaging statements allegedly made by Homar. *Id.* As such, Homar was not able to respond to the statements he allegedly made to the State Police.

On September 23, 1992, Levanowitz issued a letter to Homar demoting Homar from the position of Police Officer I, to Groundskeeper, said demotion being retroactive to August 26, 1992. Pet. App. at 5a-6a. The letter indicated that "[t]his action is being taken as a result of admissions made by yourself to the Pennsylvania State Police on August 26, 1992 . . ." *i.e.*, the statements contained in the Supplemental Report. Pet. App. at 6a.

Homar requested review of his demotion by the President of the University, James Gilbert, which was denied. Pet. App. at 6a. Homar commenced work as a groundskeeper and shortly thereafter received back pay from the date of his suspension, at a groundskeeper rate, which is less than that of a police officer. Pet. App. at 16a. On February 16, 1993, Levanowitz authorized Homar's back pay from his suspension to the date of his demotion at police officer rate. Pet. App. at 16a.

The District Court granted Defendant's Motion for Summary Judgment to which an appeal was filed by Homar. The Court of Appeals for the Third Circuit reversed the District Court's determination that Homar was properly suspended without pay.

REASONS FOR DENYING THE WRIT

I.

THE HOLDING OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT IS IN ACCORDANCE WITH *CLEVELAND BOARD OF EDUCATION V. LOUDERMILL*, 470 U.S. 532 (1985).

The Court of Appeals for the Third Circuit held that a governmental employee may not suspend an employee without pay unless the suspension is preceded by some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard. Pet. App. 14a. However, an employee may be suspended without notice and an opportunity to be heard if the suspension is with pay. *Id.*

In determining that any suspension without pay requires a pre-suspension hearing, the Court of Appeals for the Third Circuit relied upon the language in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Pet. App. at 11a. As the Court of Appeals for the Third Circuit noted, *Loudermill* clearly suggests where the employer perceives a significant hazard in keeping the employee on the job pending a pre-deprivation hearing, it is appropriate that the employee be suspended with pay. 470 U.S. 544-45. The Court stated:

> Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay.

470 U.S. 544-45 (footnote omitted).

It is conceded that the above language of *Loudermill* is *dicta*, however, such *dicta* is in complete accord with and logically follows from the Court's analysis of of the competing interests of the government "in the expeditious removal of unsatisfactory employees", and the employee's interest in preserving "the means of livelihood". 470 U.S. 542-543. Simply stated, where a governmental employer believes it is necessary to immediately remove an employee prior to a notice and opportunity to be heard, it is appropriate to suspend the employee with pay. A suspension with pay satisfies the governmental interest in "expeditious removal", and the employee's interest in maintaining "the means of livelihood".

Contrary to what is set forth in the Petition, it is submitted that the *per se* Rule promulgated by the Third Circuit requiring any pre-deprivation suspensions to be with pay does not conflict with the Court's procedural due process jurisprudence.

Petitioner argues that the Court has repeatedly rejected the idea that due process "always requires the State to provide a hearing prior to the initial deprivation of property" and has engaged in a "particularized balancing of the private and governmental interests at stake" on a case by case basis. Pet. App. at 11. It is significant that the cases cited by Petitioner herein do not concern an employee's property interests in his or her employment. In *Loudermill*, the Court noted:

> . . . [T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood.

470 U.S. at 543 (citations omitted).

It is submitted that a balancing test may be appropriate in non-employment cases where some other property right is being deprived. *Parrat v. Taylor*, 451 U.S. 527 (1981), overruled in part and other grounds, *Daniels v. Williams*, 474 U.S. 327 (1986); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). However, in an employment context, where one's means of livelihood is at stake, *Loudermill* strongly suggests that where immediate removal of the employee is required, suspension with pay is the appropriate means to effectuate said removal pending a post-deprivation hearing. The requirement that any suspension be with pay is well grounded in the Court's repeated recognition of the severity of depriving someone of his or her livelihood. *Loudermill*, 470 U.S. at 543; *FDIC v. Mallen*, 486 U.S. 230, 243.

II.

ON THE FACTS OF THIS CASE, A SUSPENSION WITH PAY WAS APPROPRIATE PENDING A PRE-DEPRIVATION HEARING.

Assuming arguendo that a *per se* rule against pre-hearing suspensions without pay is not appropriate in all cases, nevertheless, a suspension with pay was appropriate in this case.

Homar was immediately suspended without notice and an opportunity to be heard after Levanowitz learned of Homar's arrest. Pet. App. at 3a. The following day, Homar received a letter from Levanowitz advising him of his suspension pending further investigation and disposition of the criminal charges. The letter further advised Homar that any administrative action taken by the University against him "[did] not have to coincide with the disposition of those charges through the legal process". Pet. App. at 3a.

Clearly, Homar was being suspended for an indefinite, open-ended period of time. The letter to Homar advising him of his suspension specifically contemplated the suspension continuing beyond the date of the "disposition" of the criminal charges filed against Homar. The charges were dismissed after a preliminary hearing on September 1, 1992. Pet. App. at 4a. However, had the charges been bound over, it may have taken months, or possibly years, for the final disposition of the criminal case.

Under a traditional due process balancing test, it is appropriate to conclude that Homar's private interests in retaining his employment and "means of livelihood" mandated that he be provided either with a notice and opportunity to be heard prior to his suspension, or be suspended with pay during the indefinite period of suspension. As the Court noted in *Loudermill*, assuming a lengthy suspension, Homar would find it difficult to obtain employment elsewhere based upon the "questionable circumstances under which he left his previous job". 470 U.S. at 543 (citations omitted).

In cases where an independent fact finder has determined that the criminal charges are without probable cause, there is an even stronger private interest in a suspension without pay pending additional investigation. In *FDIC v. Mallen*, 486 U.S. 230 (1988), a bank president was suspended pending a post-deprivation hearing. In analyzing whether such suspension comported with due process, the Court attached significance to the determination of a grand jury that charges were supported by probable cause. 486 U.S. at 241. The Court stated:

> An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may, in limited cases, demand a prompt action justifying postponing the

> opportunity to be heard until after the initial deprivation.

486 U.S. at 240 (citations omitted).

In this case, Homar was not indicted by a grand jury, but rather was arrested by the Pennsylvania State Police. A preliminary hearing was held shortly thereafter, after which all charges against Homar were dismissed. Unlike in *Mallen*, the Homar suspension was, therefore, not ". . . supported by findings that assure that the suspension was not baseless". 486 U.S. at 241. To the contrary, an independent fact finder — the district justice at the preliminary hearing — heard the evidence and dismissed the case.[1]

Therefore, in this case, unlike *Mallen* and in other cases where the Court determined that it was appropriate to postpone the opportunity to be heard after the initial deprivation, there was no "substantial assurance that the deprivation [was] not baseless or unwarranted . . .". *Mallen* 486 U.S. at 240.

III.

THE THIRD CIRCUIT'S DECISION IS IN TRUE CONFLICT WITH ONLY ONE OTHER CIRCUIT.

The Petition suggests that the holding of the Third Circuit is in conflict with decisions of five other Circuits. Pet. at 10. A close examination of the decisions cited in the Petition reveal that the decision is in true conflict with only one other Circuit Court decision.

---

[1] Under Pennsylvania Criminal Practice, a criminal defendant is entitled to a preliminary hearing after arrest at which the Commonwealth must demonstrate a *prima facie* case. Pa. Rule of Criminal Procedure, 141(d); 143(a). If a *prima facie* case is not established, the defendant must be discharged. *Id.* In order to establish a *prima facie* case, the Commonwealth must establish that a crime was committed and the accused is probably the individual who committed it. *Commonwealth v. Wojdak*, 502 Pa. 359, 466 A.2d 991 (1983).

The Third Circuit's decision is in conflict with *Bailey v. Board of County Commissioners of Alaachuka County*, 956 F.2d 1112 (11th Cir. 1992).

However, it is submitted that the Third Circuit's decision is not in conflict with the other circuit court cases cited at decisions cited in the Petition. Only one other case cited in the Petition squarely considers the language in *Loudermill* relied upon by the Third Circuit. In *Engdhal v. Department of Navy*, 900 F.2d 1572 (Fed. Cir. 1990), the Court found that Engdhal was afforded procedural due process prior to being suspended after criminal charges were filed against him relating to the sexual assault of his daughter. 900 F.2d at 1575. The court did not find that Engdhal was properly suspended without a pre-suspension hearing, but rather found that the procedural due process afforded Engdhal prior to his suspension was adequate. 900 F.2d at 1575-1576.[2]

None of the other decisions cited in the petition squarely consider the language in *Loudermill* relied upon by the Third Circuit.

---

[2] Engdhal was placed on administrative leave with pay pending a decision of whether to suspend him. During his administrative leave, he met with governmental officials to discuss potential adverse action based upon the government's concerns with respect to the criminal charges. After he received notice of his proposed suspension, he was provided an opportunity to personally and/or in writing submit a reply disputing the grounds for suspension. In addition to a written reply, he personally met with governmental officials and had legal representation via telephone during a telephone conference call which occurred at one of the meetings. 900 F.2d at 1576.

In *Jones v. City of Gary Indiana*, 57 F.3d 1435 (7th Cir. 1995), a fire fighter was suspended from his employment based upon a refusal of the fire fighter to return to work based on medical reasons. *Citing Matthews v. Eldridge*, 424 U.S. 319, 344 (1976), the Court found that because the relevant inquiry in the case was a medical one, and employee was subject to three independent medical board evaluations all which had found employee fit to return to duty, that suspension without a pre-suspension hearing was appropriate. 57 F.3d at 1435. The court opined where there had been numerous reviews of employee's medical history, all of which determined that employee could return to work, that "... there was no risk that [employee] was erroneously deprived of his protected interest in employment without a pre-suspension hearing ...". 57 F.3d at 1443.

In *Ambus v. Granite Board of Education*, 975 F.2d 1555 (10th Cir. 1992), it is unclear whether the court determined that the suspended teacher had been afforded a notice and opportunity to be heard prior to his suspension, or that the suspension without pay was appropriate based upon the substantial government interest at stake. The court did specifically note that the school district notified the teacher before the suspension, and had formally provided him an opportunity to correct any erroneous information upon which his suspension was based. 975 F.2d at 1562.

Finally, in *Strong v. Board of Education of Uniondale, Union Free School District*, 902 F.2d 208 (2nd Cir. 1990), concerning the suspension of a teacher who refused to provide medical records to the school district after taking sick leave, the court determined that under New York law, a teacher who is not permitted to return from an extended voluntary sick leave because of a failure to supply medical records is not considered suspended or terminated. In any event, the court determined that the matter at issue was not a disciplinary matter, but rather a mere request for medical records on the part of the district. 902 F.2d at 212.

Based upon the foregoing, there is no widespread conflict in the Circuits that would mandate the grant of the Petition.

IV.

THE THIRD CIRCUIT DECISION MAY BE EASILY APPLIED BY PUBLIC EMPLOYERS AT ALL LEVELS OF GOVERNMENT.

Where a public employer has a substantial interest in suspending an employee pending a post-deprivation hearing, the Third Circuit's decision does not prevent suspension, but merely requires the suspension to be with pay, or after a pre-suspension opportunity to be heard. The holding of the Third Circuit may be simply applied in all applicable instances.

The decision does not pose an undue hardship or burden upon a public employer who should, in any event, expeditiously investigate and finally determine allegations of wrong doing on the part of an employee. Should the employer wish to extend an investigation beyond the date of final disposition of criminal charges, as was the case in the within matter, then the private interest of the employee in maintaining his other means livelihood makes it appropriate that the employee continue to be paid during the period of such investigation, the conduct and time frame of which is solely in the discretion of the public employer.

CONCLUSION

For the above reasons, the Court should deny the Petition for Writ of Certiorari and allow to stand the holding of the Court of Appeals for the Third Circuit requiring a public employer to provide an employee with the notice and opportunity to be heard prior to any pre-deprivation suspension or, in the alternative, require the public employer to suspend such employee during the period of any investigation with pay.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 11 1997
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No. 96-651

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAMES E. GILBERT, ET AL.,
Petitioners
vs.

RICHARD J. HOMAR,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

JAMES V. FARERI, ESQ. 712 Monroe Street Stroudsburg, PA 18360 (717) 421-9090	GWENDOLYN T. MOSLEY *Senior Deputy Attorney General* Office of Attorney General 15th Floor, Strawberry Sq. Harrisburg, PA 17120 (717) 783-1471
Counsel for Respondent	Counsel for Petitioners

Petition for Certiorari Filed October 18, 1996
Certiorari Granted January 3, 1997

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RELEVANT DOCKET ENTRIES

Date	No.	Proceedings
1993		
6/7	1	Complaint filed
9/7	15	Answer filed
1994		
1/18	19	ESU's motion for summary judgment and statement of material facts filed
2/1	20	ESU's brief in support of motion for summary judgment filed
2/1	21	ESU's statements in support of motion for summary judgment
2/16	22	Homar's response to ESU's statement of material facts filed
2/16	23	Homar's brief in opposition to ESU's motion for summary judgment filed
3/14	32	ESU's reply brief filed
1995		
3/17	34	Memorandum and Order dated 3/17/95 that ESU's motion for summary judgment is granted filed

3/17	**35**	**Judgment entered in favor of ESU officials and against Homar**
4/14	**36**	**Homar's notice of appeal filed**
4/20		**Homar's appeal docketed by Third Circuit**
6/20		**Homar's brief filed in Third Circuit**
6/20		**Homar's appendix filed**
7/24		**Brief of ESU officials filed in Third Circuit**
1996		
7/18		**Published opinion filed. Judge Alito filed opinion concurring in part and dissenting in part.**
7/18		**Judgment filed affirming in part, reversing in part and remanding**
8/16		**Motion of ESU officials to stay mandate filed**
9/3		**Order granting motion to stay the mandate**
9/9		**Mandate issued, filed**
10/30		**Supreme Court of U.S. notice filed advising that petition for writ of certiorari filed. Filed in Supreme Court on 10/16/96 at Supreme Court case no. 96-651**

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD J. HOMAR,	:	
Plaintiff	:	**NO. 3:CV-93-0852**
v.	:	
	:	
JAMES E. GILBERT, et al.	:	**JURY TRIAL**
Defendants	:	**DEMANDED**

COMPLAINT

AND NOW, comes Richard J. Homar by his attorneys, Newman, Williams, Mishkin, Corveleyn, Wolfe & Fareri, P.C., and files the following Complaint against Defendants:

1. This is a civil action seeking damages and equitable relief against Defendants for committing acts, under color of law, which deprived Plaintiff of well settled rights, privileges and immunities secured under the Constitutional laws of the United States. The acts were perpetrated by James E. Gilbert, President of East Stroudsburg University, Gerald Levanowitz, East Stroudsburg University Director of Human Resources, David Marazas, East Stroudsburg University Police Chief, and Curtis English, Vice

President of East Stroudsburg University, all acting in their official and individual capacities. By committing the acts stated herein, Defendants have denied Plaintiff his right to substantive and procedural due process and breached his contract of employment with East Stroudsburg University as a police officer.

2. This Court has jurisdiction of this action under 42 U.S.C.A. §1983, 28 U.S.C. §1343 and 28 U.S.C. §1331.

3. Plaintiff is a citizen of the United States of America and a resident of 421 King Street, East Stroudsburg, Pennsylvania 18301.

4. Defendant James E. Gilbert is a resident and citizen of the Commonwealth of Pennsylvania who is the President of East Stroudsburg University and maintains an office at the Jeanette Reibman Building, Prospect and Normal Streets, East Stroudsburg, Pennsylvania 18301.

5. Defendant Gerald Levanowitz is an adult individual and resident of Pennsylvania who is Human Resource Director at East Stroudsburg University and maintains an office at the

Jeanette Reibman Building, Prospect and Normal Streets, East Stroudsburg, Pennsylvania 18301.

6. Defendant David Marazas is an adult individual and resident of Pennsylvania who is the East Stroudsburg University Police Chief who maintains an office at Prospect Street, East Stroudsburg, Pennsylvania 18301.

7. Curtis English is an adult individual and resident of Pennsylvania who is the Vice President of East Stroudsburg University who maintains an office at the Jeanette Reibman Building, Prospect and Normal Streets, East Stroudsburg, Pennsylvania 18301.

8. On or about June 16, 1989, Plaintiff had been hired by East Stroudsburg University as a Groundskeeper and he worked in such capacity for four (4) years.

9. Plaintiff applied for the position of Police Officer at East Stroudsburg University and was hired on February 10, 1992 and was placed on a probationary period for six (6) months.

10. On or about August 10, 1992 Plaintiff's probationary period had concluded.

11. During the probationary period Plaintiff had become a member of the International Union, United Plant Guard Workers of America Local 506 and Plaintiff and Defendants were subject to the agreement between the Commonwealth of Pennsylvania and the International Union, United Plant Guard Workers of America.

12. On or about August 26, 1992, Plaintiff was arrested by members of the Pennsylvania State Police Region I Strike Force and Troop "N" Vice and Narcotics Unit upon the execution of a search warrant for the residence located at Lake Valhalla, Smithfield Township, Monroe County, Pennsylvania.

13. Plaintiff was charged with possession, delivery of marijuana and criminal conspiracy.

14. As per letter dated August 27, 1992 Plaintiff was notified that effective immediately on August 26, 1992 he was suspended without pay as a Police Officer at East Stroudsburg University pending further investigation and disposition of the charges filed on August 26, 1992.

15. On August 28, 1992, Gerald Levanowitz, East Stroudsburg University Director of Human Resources, made a statement to the media that he and campus police were investigating the charges against Plaintiff.

16. By way of letter dated August 28, 1992 Levanowitz notified the Plaintiff that he was suspended without pay, without hearing, without an opportunity to be heard or to otherwise confront his accusers.

17. On September 1, 1992 a hearing was held before the District Justice, Charles Eyer, and upon the conclusion of the proceeding District Justice Eyer ruled that there was insufficient evidence to hold Plaintiff for trial and dismissed all charges.

18. Plaintiff in accordance with United Plant Guard Workers of America collective bargaining agreement grieved the suspension.

19. On September 18, 1992 an informal meeting was held before Gerald S. Levanowitz, Director of Human Resource Management, David Marazas, Chief of Police, Richard Connel,

International Union, United Plant Guard Workers of America Representative and Plaintiff.

20. Plaintiff had been advised by Levanowitz prior to the date of the meeting of September 18, 1992 that he could not bring his attorney.

21. Without Plaintiff's counsel being present, Levanowitz informed Plaintiff that it was in his best interest to answer all questions in order to regain his position with the Campus Police Department and he should discuss what had happened the day of the arrest. Plaintiff provided a statement of the event at such time.

22. By way of letter dated September 23, 1992, and without any further investigation, Plaintiff was informed by Levanowitz that he was demoted from his position as Police Officer I in the Campus Police Department to the position of Groundskeeper, a position formerly held by Plaintiff and said action became effective retroactive to August 26, 1992.

23. As per letter dated September 24, 1992, James E. Gilbert, President of East Stroudsburg University, sustained

the recommendations of the Police Chief Marazas, Director Levanowitz and Vice President English.

24. On or about September 30, 1992 David A. Pottiger, Vice President of Amalgamated Local Union No. 506 forwarded a letter to William C. Hamilton of the State System of Higher Education, Commonwealth of Pennsylvania, filing the grievance on behalf of Plaintiff pursuant to the Collective Bargaining Agreement.

25. On or about October 6, 1992 William C. Hamilton, in response to the grievance requested an extension of time and by way of letter dated October 12, 1992, Pottiger responded that in accordance with the contract fifteen (15) working days were sufficient for the investigation to be conducted.

26. On or about November 13, 1992 a letter was forwarded to Pottiger denying the grievance on the basis of their investigation.

27. On or about November 16, 1992 Pottiger submitted the matter to Clair Kenyon, Bureau of Labor Relations in

accordance with step 4 of the grievance procedure of the union contract.

28. On or about December 18, 1992 Kenyon responded denying the grievance at step 4 based on the report completed on August 27, 1992, a day after the arrest by Trooper Richard Raab of the Pennsylvania State Police.

29. In accordance with the collective bargaining agreement whereby step 4 of the grievance procedure was not met a letter was forwarded to the President of Local 506 requesting that the grievance be submitted for arbitration.

30. On or about January 11, 1993 Dennis Eck, President of Local 506, forwarded a letter to the Grievance Division, Bureau of Labor Relations, Harrisburg, PA, demanding to advance to arbitration concerning the matter and suggesting arbitrators for consideration of this grievance.

31. By way of letter dated February 8, 1993 Dennis Eck, President of Local 506, informed the Vice President that the grievance was withdrawn from arbitration and no further action would be taken on this matter.

32. At the time Plaintiff was advised on August 27, 1992 that he would be suspended without pay no hearing was conducted.

33. The subsequent action taken by Gerald Levanowitz, Director of Human Resource Management, in demoting Plaintiff to the position of Groundskeeper on the basis of statements made to the State Police at the time of his arrest and for which Plaintiff was subsequently cleared is false and stigmatizing.

34. The grievance request was denied before the Bureau of Relations where the report prepared by the police was given credence and whereby Plaintiff was not allowed to question the officer as to the accuracy of his statements.

35. In accordance with the contractual agreement between the Commonwealth of Pennsylvania and the International Union, United Plant Guard Workers of America has exhausted all grievance procedures.

36. Plaintiff's demotion to Groundskeeper and Defendant's failure to reinstate Plaintiff as a police officer seriously damaged his standing or association in the community whereby

Plaintiff, who has been cleared of all charges, continues to be stigmatized by Defendants' action.

37. The acts described herein and committed by Defendants James E. Gilbert, Gerald Levanowitz, Curtis English, David Marazas were committed either by motive or intent and/or with reckless or callous indifference to Plaintiff's federally protected rights.

COUNT I

PROCEDURAL DUE PROCESS

RICHARD J. HOMAR VS. JAMES GILBERT, GERALD LEVANOWITZ, DAVID MARAZAS AND CURTIS ENGLISH

38. Paragraphs 1 through 37 are incorporated by reference herein and made part hereof.

39. On August 26, 1992 Defendants James Gilbert, Gerald Levanowitz, David Marazas and Curtis English agreed and conspired to suspend Plaintiff without pay, without hearing, without notice, without an opportunity to be heard and without other procedural guarantees as set forth under the

Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution.

40. As a consequence thereof, Plaintiff was denied valuable property and liberty without procedural due process.

WHEREFORE, Plaintiff requests your Honorable Court to award the following relief:

A. To order that Plaintiff be reinstated to the position of police officer with East Stroudsburg University Police Force;

B. To award Plaintiff back pay;

C. To award Plaintiff reasonable counsel fees;

D. To award Plaintiff damages in an amount in excess of Fifty thousand ($50,000.00) Dollars due to the abridgement of his constitutional rights as above described; and

E. Any other relief your Honorable Court deems appropriate under the circumstances.

COUNT II

SUBSTANTIVE AND PROCEDURAL DUE PROCESS

RICHARD J. HOMAR VS. JAMES GILBERT, GERALD LEVANOWITZ, DAVID MARAZAS AND CURTIS ENGLISH

41. Paragraphs 1 through 40 are incorporated herein by reference and made part hereof.

42. Defendants named herein above in their official and individual capacities deprived Plaintiff of liberty and property and further violated substantive and procedural due process guaranteed to him under the Fifth and Fourteenth Amendments of the United States Constitution and the Pennsylvania Constitution, to wit:

A. Plaintiff was deprived of his property including, but not limited to, his employment status as Police Office arbitrarily, capriciously and in bad faith;

B. Plaintiff's suspension and demotion are without cause;

C. Plaintiff's demotion was a matter for which Plaintiff was never given notice and an opportunity to be heard and to the contrary, the meeting of September 18, 1992 was not a hearing in that Defendants took statements and did not allow Plaintiff's counsel to be present; and

D. The conduct taken by Defendants with regard herein were arbitrary, irrational, unlawful and tainted the grievance procedure followed by Plaintiff in accordance with his contractual rights.

WHEREFORE, Plaintiff requests your Honorable Court to award the following relief:

(a) To order that Plaintiff be reinstated to the position of police officer with East Stroudsburg University Police Force;

(b) To award Plaintiff back pay;

(c) To award Plaintiff reasonable counsel fees;

(d) To award Plaintiff damages in an amount in excess of Fifty thousand ($50,000.00) Dollars due to the abridgement of his constitutional rights as above described; and

(e) Any other relief your Honorable Court deems appropriate under the circumstances.

A JURY TRIAL IS DEMANDED.

NEWMAN, WILLIAMS, MISHKIN,
CORVELEYN, WOLFE & FARERI

By: S/James V. Fareri
James V. Fareri, Esq.
Attorney I.D. #34402

By: S/Maria M. Chesterton
Maria M. Chesterton, Esq.
Attorney I.D. #54911
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD J. HOMAR,	:	**NO. 3:CV-93-0852**
Plaintiff	:	
VS	:	**(JUDGE McCLURE)**
	:	
JAMES E. GILBERT, et al.,	:	
Defendants	:	

ANSWER

The defendants by their attorney answer the complaint as follows:

1. Paragraph 1 is denied. The defendants did not deny plaintiff his rights or breach plaintiff's contract of employment. The defendants' positions are admitted. The rest is a legal conclusion to which no answer is required.

2. Paragraph 2 is a legal conclusion to which no answer is required.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted that this was English's former position and address at the relevant times. Denied that it is his current position or address.

8. Admitted that plaintiff was hired in 1989 as a groundskeeper at ESU. The rest of paragraph 8 is denied.

9. Admitted that plaintiff was made a police officer at ESU effective February 10, 1992, and was placed on probationary status for 6 months from that date. The rest of paragraph 9 is denied.

10. Paragraph 10 is admitted.

11. Denied that defendants were subject to the agreement. The rest of paragraph 11 is admitted.

12. Paragraph 12 is admitted.

13. Paragraph 13 is admitted in part and denied in part. The state police charged plaintiff with possession with intent to deliver a controlled substance, possession of a controlled substance, and criminal conspiracy.

14. Paragraph 14 is admitted.

15. Paragraph 15 is denied.

16. Paragraph 16 is denied.

17. Admitted that a hearing was held on September 1, 1992, before District Justice Eyer and he eventually dismissed the charges. The defendants are without knowledge or information sufficient to form a belief as to the rest of paragraph 17.

18. Paragraph 18 is denied.

19. It is admitted that a meeting was held at the office of Gerald S. Levanowitz, Director of Human Resource Management, and Chief of Police Marazas, UPGWA representative Connel, and plaintiff were present. The rest of paragraph 19 is denied.

20. Paragraph 20 is admitted in part and denied in part. Levanowitz did advise plaintiff prior to the meeting that he did not have a right to have his counsel present. Just before the meeting began, Levanowitz indicated that he would permit plaintiff to have his counsel there but that that would require rescheduling the meeting. Plaintiff chose not to reschedule the meeting and to proceed with the meeting without his counsel. The rest is denied.

21. Admitted that plaintiff's attorney was not presented and plaintiff did give a statement which included information about events on August 26, 1989. The rest of Paragraph 21 is denied as stated. Levanowitz told plaintiff that the meeting was to provide plaintiff with an opportunity to provide information on plaintiff's behalf that would assist ESU in making a determination on the suspension.

22. Admitted that Levanowitz notified plaintiff by letter of September 23, 1992, that he was demoted form Police Officer I to Groundskeeper, a position formerly held by plaintiff, effective August 26, 1992. The rest of Paragraph 22 is denied.

23. Admitted that Gilbert's letter of September 24, 1993, stated this.

24. Paragraph 24 is admitted.

25. Paragraph 25 is admitted.

26. Paragraph 26 is admitted.

27. Paragraph 27 is admitted.

28. Paragraph 28 is admitted in part and denied in part. This was not the only reason given.

29. Paragraph 29 is denied as stated.

30. Paragraph 30 is admitted.

31. The defendants are without knowledge or information sufficient to form a belief whether a vice-president was notified.

32. Admitted that no hearing was held on August 27, 1992. However, plaintiff was subsequently given pay as a police officer through September 23, 1992.

33. Paragraph 33 is denied.

34. Paragraph 34 is denied as stated. The grievance was denied by the Bureau of Labor Relations at Step 4. The police report, among other things, was considered. UPGWA requested arbitration where it was free to question the officer on Homar's behalf. The request for arbitration was withdrawn.

35. Paragraph 35 is denied. UPGWA withdrew its request for arbitration.

36. Paragraph 36 is denied.

37. Paragraph 37 is denied.

COUNT I

38. Defendants' responses to paragraphs 1 through 37 are incorporated herein.

39. Paragraph 39 is denied.

40. Paragraph 40 is denied.

COUNT II

41. Defendants' responses to paragraphs 1 through 40 are incorporated herein.

42. Paragraph 42 is denied.

NEW MATTER

43. Each defendant enjoys a qualified immunity from an award of damages, because he is government official performing discretionary acts and the claimed constitutional right was not clearly established at the time defendant is alleged to have acted.

44. The defendants cannot be held liable for any violation of plaintiff's constitutional rights committed by others without defendants' participation or direction.

45. The defendants are immune from suit under Pennsylvania law.

46. The defendants have official immunity.

47. The state employees sued in their official capacity are immune from suit under the Eleventh Amendment.

WHEREFORE, defendants request the court to enter judgment in their favor and award them costs.

Respectfully submitted,

ERNEST D. PREATE, JR.
Attorney General

By: S/Michael B. Sutton
MICHAEL B. SUTTON
Deputy Attorney General

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section

Office of Attorney General
15th Fl., Strawberry Sq.
Harrisburg, PA 17120
(717)783-1471
DATE: September 7, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD J. HOMAR,	:	**NO. 3:CV-93-0852**
Plaintiff	:	
VS	:	**(JUDGE McCLURE)**
	:	
JAMES E. GILBERT, et al.,	:	
Defendants	:	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants move for summary judgment against the plaintiff under Fed.R.Civ.P. 56. There is no genuine issue as to any material fact. The defendants are entitled to judgment as a matter of law.

WHEREFORE, summary judgment should be entered on behalf of all the defendants.

Respectfully submitted,

ERNEST D. PREATE, JR.
Attorney General

By: S/Michael B. Sutton
MICHAEL B. SUTTON
Deputy Attorney General

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section

Office of Attorney General
15th Fl., Strawberry Square
Litigation Section
Harrisburg, PA 17120
(717) 783-1471
DATED: January 18, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD J. HOMAR,	:	**NO. 3:CV-93-0852**
Plaintiff	:	
VS	:	**(JUDGE McCLURE)**
	:	
JAMES E. GILBERT, et al.,	:	
Defendants	:	

DEFENDANTS' STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 7.4, the defendants submit that there is no genuine issue to be tried to the following facts:

1. On August 26, 1992, plaintiff Richard Homar was a Police Officer I employed by East Stroudsburg University (ESU) of the State System of Higher Education, Commonwealth of Pennsylvania.

2. At all relevant times, the defendants were employed by ESU in the following positions: James Gilbert - President; Gerald Levanowitz - Director of Human Resources; David Marazzas - Police Chief; and Curtis English - Vice President.

3. President Gilbert has final authority on questions of suspension and demotion of ESU police officers but had delegated

authority to Levanowitz to act for the president in those areas at this time.

August 26, 1992

4. Homar was arrested in a drug raid at the home of James Crompton in Lake Vahalla, Springfield Township, Monroe County, Pennsylvania.

5. State Trooper Raab and Office of Attorney General Agent Gerrard interviewed Homar at the Swiftwater State Police Station.

6. The State Police notified Marazzas of the arrest and filing of charges and stated Homar was involved in drug matters.

7. State Trooper Mark George filed criminal charges against Homar for possession with intent to deliver a controlled substance (marijuana), possession of a controlled substance (marijuana), and criminal conspiracy with Crompton to violate the controlled substance law (which is a felony).

8. Marazzas and Levanowitz discussed the information from the State Police.

9. Levanowitz decided to suspend Homar without pay immediately.

10. No non-salary benefits were affected.

11. No pre-suspension hearing was held.

12. Homar did not show up for his 4:00 p.m. midnight shift.

August 27, 1992

13. Trooper Raab prepared a supplemental report discussing his interview of Homar the day before.

14. In a telephone call from Homar, Marazzas told Homar he was being suspended.

15. A letter of suspension from Levanowitz to Homar was delivered later to Homar.

16. The letter notified Homar of his suspension pending further investigation and disposition of the criminal charges and explained University action did not have to coincide with disposition of the criminal charges.

September 2, 1992

17. Levanowitz learned the district justice dismissed the criminal charges against Homar on September 1, 1992.

18. Levanowitz felt he needed to do his own investigation of the events before deciding on the discipline of Homar.

September 11, 1992

19. Levanowitz and ESU Police Sergeants Hess and May went to the Swiftwater Station and met with the State Police.

20. The State Police discussed Homar's drug involvement and gave Levanowitz a copy of Raab's August 27, 1992 supplemental report.

21. The report states that during the time Homar was an ESU police officer he was aware of Crompton and a Mr. Habhab's drug dealing and Homar had received marijuana from Habhab.

22. There was no evidence that Homar reported either to police authorities.

September 15, 1992

23. Levanowitz called Homar to set up a meeting on September 18, 1992.

24. Levanowitz told Homar this will be his opportunity to give his version of events from August 26, 1992 through September 1, 1992.

25. Homar was covered by a union contract. Levanowitz explained that Homar may bring his union representative but has no right to bring an attorney.

September 18, 1992

26. A meeting was held in Levanowitz' office with Homar, Union Representative Richard Connell, Levanowitz, Marazzas, and Levanowitz' secretary.

27. At the meeting, Connell relayed that Homar's lawyer (James Fareri) wanted to be present.

28. The union contract does not give an employee a right to a lawyer at the disciplinary hearing.

29. Levanowitz indicated that he would nonetheless permit Homar to have a lawyer present but if Homar's lawyer was present, ESU would want its lawyer to be present and this would result in a delay.

30. Homar or Connell elected to proceed without Homar's lawyer being present.

31. Levanowitz explained that the meeting's purpose was to give Homar a chance to provide any information that would assist ESU in making a determination that would end the suspension and help Homar in presenting his case.

32. Homar explained how he came to Crompton's home and was present in the drug raid.

33. Homar professed innocence.

September 23, 1992

34. Levanowitz decided to demote Homar to groundskeeper, a position held by Homar at ESU before he became a police officer.

35. A demotion letter was sent by Levanowitz to Homar explaining, in part, that:

> This is to inform you that you are to be demoted from your position as a Police Officer I in the Campus Police Department to the position of Groundskeeper, a position which you formerly held. This action is effective retroactive to August 26, 1992, and you are to be given back pay to that date at the rate of pay for a Groundskeeper. You are to

> report to work at 7:00 A.M. on September 24, 1992 at the Facilities Management Office. Your new rate of pay as a Groundskeeper will be $552.80 bi-weekly.
>
> This action is being taken as a result of admissions made by yourself to the Pennsylvania State Police on August 26, 1992 that you maintained associations with individuals whom you knew were dealing in large quantities of marijuana and that you obtained marijuana from one of those individuals for your own use. Your actions constitute a clear and flagrant violation of Sections 200 and 200.2 of the East Stroudsburg University Police Department Manual.
>
> As you must know, Police Officers are held accountable for a higher standard of conduct than is the rest of the population. Maintaining these associations and admitted use of a controlled substance is a degradation of that standard that cannot be tolerated.

September 24, 1992

36. Union representatives contacted President Gilbert's office and requested a meeting to discuss the disciplinary action.

37. At 2:00 p.m., Gilbert met with Connell, Union Vice President Pottiger, and Homar and Levanowitz.

38. Levanowitz left most of the meeting, at the union representative's request.

39. The meeting was over in 30-35 minutes.

40. Homar's normal work day as a police officer was 4:00 p.m. - midnight.

41. At the meeting Homar had the September 23, 1993, demotion letter and Trooper Raab's August 27, 1992 Supplemental State Police Report, relied upon by Levanowitz as evidence of Homar's wrongdoing.

42. Homar had notice of the basis for the demotion and the evidence of wrongdoing relied upon by ESU in demoting.

43. Gilbert had authority to reverse Levanowitz' disciplinary action.

44. The union representatives and Homar were given full opportunity to respond to the charges and discipline imposed in the August 23, 1992 letter.

45. Later, Gilbert sent out a letter to Homar upholding the disciplinary decision.

September 30, 1992

46. Homar's union grieved his discipline under the union contract.

47. The union was free to present evidence in support of Homar's position.

November 13, 1992

48. The State System of Higher Education denied the grievance at Step 3.

December 18, 1992

49. The Commonwealth's Office of Labor Relations, Bureau of Labor Relations denied the union's grievance at Step 4.

February 8, 1993

50. The union withdrew its demand for arbitration made following the denial at Step 4.

February 16, 1993

51. Levanowitz directed a retroactive payment to Homar of the difference in groundskeeper salary and Homar's police officer salary for the period of suspension August 26, 1992 to September 24, 1992.

52. Homar does not claim he lost pay or benefits during the period of suspension.

Respectfully submitted,

ERNEST D. PREATE, JR.
Attorney General

By: S/Michael B. Sutton
MICHAEL B. SUTTON
Deputy Attorney General

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section

Office of Attorney General
15th Fl., Strawberry Sq.
Litigation Section
Harrisburg, PA 17120
(717) 783-1471
DATED: January 18, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD J. HOMAR,	:	**NO. 3:CV-93-0852**
Plaintiff	:	
VS	:	**(JUDGE McCLURE)**
	:	
JAMES E. GILBERT, et al.,	:	
Defendants	:	

STATEMENT OF JAMES GILBERT

I, JAMES GILBERT, make the following statement on personal knowledge:

1. I am the President of East Stroudsburg University ("ESU").

2. I have the authority to suspend and demote ESU police officers.

3. I have delegated that authority to Gerald Levanowitz.

4. I retain the authority to override the employment decisions of Mr. Levanowitz.

5. On the morning of September 4, 1992, my secretary advised me that Richard Connell wanted to meet me to discuss the Homar discipline.

6. I agreed and had a meeting set for the same day at 2 P.M.

7. Union representative Richard Connell, Union Vice-President David Potteiger, Richard Homar, and I were present for the whole meeting.

8. Potteiger said the purpose of the meeting was to appeal Levanowitz' disciplinary decision of September 23, 1992.

9. Levanowitz was present but then left for most of the meeting at the request of the union member.

10. Homar made a statement.

11. Homar also challenged the accuracy of the state police report by Trooper Raab, dated August 27, 1992.

12. There was no limit on what Connell, Potteiger, or Homar could say or evidence they could present.

13. The meeting lasted 30-35 minutes.

14. I reviewed Levanowitz' correspondence with Homar and Raab's report.

15. I decided Levanowitz' decision was correct and upheld his action.

16. I drafted and sent to Homar a letter dated September 24, 1992, upholding the demotion.

17. I had no bias against Homar.

I, James Gilbert, state that the foregoing is true and correct. Executed on January 25, 1994.

S/James E. Gilbert
JAMES GILBERT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD J. HOMAR, : **NO. 3:CV-93-0852**
:
Plaintiff :
v. :
:
JAMES E. GILBERT, et al., :
:
Defendants :

DEPOSITION OF RICHARD J. HOMAR

[PAGE 3]

RICHARD J. HOMAR, having been duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. SUTTON:

Q. What is your full name?

A. Richard Joseph Homar.

Q. Do you understand that you're under oath today?

A. Yes, I do.

[PAGE 5]

Q. Have you ever been married?

A. No, thank goodness.

Q. What is your educational background?

A. East Stroudsburg High School, that's all. I have graduated from there.

Q. What were your job functions as an East Stroudsburg University Police Officer?

A. Just to keep an eye on the campus, do regular walking around and locking up buildings, making sure--stuff like that, just security.

Q. Were you given any written instructions as to your responsibilities as an officer?

A. No, just a handbook I was given.

Q. Do you still have that handbook?

A. I've moved around once or twice, not that I have on me.

Q. And what is your current employment?

A. I'm still at East Stroudsburg University as a groundskeeper.

Q. Have you applied for any other positions in the last three years?

A. No, I've been with the university since '89.

Q. Have you read the compliant that was filed in this case?

[PAGE 6]

A. Yes, I have.

Q. Are you familiar with the claims there are in the complaint?

A. Yes, I am.

Q. When you applied for the position of police officer did you have to fill out a job application?

A. I'm not sure. At this time I don't remember. I remember I filled out some things for Mr. Levanowitz. That was a while ago, I can't answer on that.

Q. Have you ever been fired from a job?

A. Never.

Q. I'm going to show you what's marked as a police officer application.

A. Um-humm.

Q. Do you remember filling that out?

A. Yes, that is my writing.

Q. And do you remember filling out an employment portion of that application?

A. That is my writing, yes, it is.

Q. Is there--was there anything omitted from that employment section?

A. I don't know.

Q. Were any jobs that you held during that

***

[PAGE 7]

Q. Now, when you were suspended from your police officer position do you remember the events that occurred around that time?

[PAGE 8]

A. Yes, I do.

Q. Did you receive any notice of why the university wanted to suspend you?

A. Only of the drugs charges I faced against the State Police.

Q. And how did you receive notice of that?

A. That I was being suspended?

Q. Yes.

A. Chief Marazas and Cindy Bogart came to my address to give me a letter that he had to hand deliver to me.

MR. SUTTON: I'd like to have this marked as Exhibit Number 1.

(Defendant's Deposition Exhibit Number 1 was marked for identification.)

MR. SUTTON: That's the August letter.

Q. Now, I'm showing you an August 27, 1992 letter to you from Jerry Levanowitz, which we've marked as Defendant's Exhibit 1. Is that the letter you received?

A. Yes, it is, Mike.

Q. Had you received any other notice that you were being suspended?

A. That was the only one I received.

[PAGE 9]

Q. Did anyone tell you orally that you were being suspended?

A. Mr. Levanowitz on the phone, but I'm not sure if that was before that. It had to have been after that letter I talked to him on the phone.

Q. Did anyone else tell you that you were being suspended?

A. Only Mr. Levanowitz.

Q. What did Mr. Levanowitz tell you on the phone?

A. Pretty much the same thing, Mike, that is written in that letter.

Q. Were you advised as to what evidence the university was considering in suspending you?

MR. FARERI: At that time?

MR. SUTTON: At that time.

A. Oh, no, I did not--only what the State Police were charging me with, the outcome of those charges.

Q. Were you told at any later date what evidence the university was using against you to suspend you?

A. I'm not sure of the time frame of that but I think I received a certified letter from Mr. Levanowitz with a supplementary report from Trooper Raab.

[PAGE 10]

Q. When did you receive that?

A. Mike, I can't give you a definite date but I'd have to say at least a month later.

Q. Was it before your meeting with Mr. Levanowitz?

A. I can't not answer that. I'm not sure, Mike.

Q. You referred to a letter. Now, I'm going to show you two things, one has been marked Defendant's Exhibit 2 and that's a letter.

(Defendant's Deposition Exhibits Number 2 and 3 were marked for identification.)

A. I'm aware of this one, Mike.

Q. Okay. And also Defendant's Exhibit 3 which is a Supplement State Police Report?

A. I remember this one, too, Mike.

Q. Now you said you received a letter with a State Police report attached to it. Was the letter marked

Defendant's Exhibit 2 dated September 23rd the letter you were referring to or was it a different letter?

A. This one was the one I received, the second one, Mike.

Q. Okay. Defendant's Exhibit 2?

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A. Yes.

Q. Was Defendant's Exhibit 3 included with that?

A. No, I think that that was at a later date but I'm not sure.

Q. Did you receive any other letters from the university other than that, Defendant's Exhibits 1 and 2, prior to your meeting with Jerry Levanowitz?

MR. FARERI: Relating to the suspension or demotion?

MR. SUTTON: Relating to the suspense [sic] or demotion.

MR. FARERI: He did receive, obviously, other letters.

A. No, that was it.

Q. Had anyone from the university discussed with you the evidence that was being used against you to suspend you prior to the September 18th, meeting with Jerry Levanowitz?

A. No, Mike.

Q. Did you discuss this at all with your union representative?

MR. SUTTON: What do you mean, by this?

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MR. SUTTON: The suspension.

A. Yes.

Q. Who did you speak with?

A. Dave Pottiger, he's the local vice-president for 506.

Q. And what did he tell you?

A. He told me he was going to work on my case for me through a grievance.

Q. What did you tell him?

A. I was supportive of what he was going to help me with.

Q. When was the first time you saw Defendant's Exhibit 3, the State Police Report?

A. After--during about a month after my arrest. I did not see this--

Q. Did you see it at all before your preliminary hearing?

A. No.

Q. And do you remember how you first saw it?

A. Mr. Levanowitz gave it to me.

Q. And do you remember when?

A. No, Mike, I can't give you a specific date.

Q. Would it have been before this September

[PAGE 13]

18th meeting?

A. I'm not sure, Mike.

Q. Did Mr. Levanowitz say anything when he gave you that statement?

A. It was mailed. It was mailed to me through the post office or campus mail, I'm not sure.

Q. So when you say Mr. Levanowitz gave it to you, he didn't hand it to you?

A. No, it was campus mail or through the post office.

Q. Was there anything else that Mr. Levanowitz sent you other than the items marked Defendant's Exhibits 1, 2 and 3 prior to the September 18th meeting?

A. No.

MR. FARERI: Just a point of clarification, he's testified as to Exhibit Number 3 that he's uncertain whether he got that.

MR. SUTTON: Right. I'm just trying to determine if anything else was received from him.

A. No, Mike.

Q. From Mr. Levanowitz, okay. Did you discuss the charges with

[PAGE 14]

Mr. Connell?

MR. FARERI: Which charges?

Q. I'm sorry, did you discuss the suspension and the grounds that were being presented for the suspension with Mr. Connell?

A. Yes, I did.

Q. And what did Mr. Connell tell you?

A. He was supportive of me and he felt that they violated my rights.

Q. Did he indicate to you what the issues were that were going to be addressed at the meeting?

A. No, no one was aware of what was going to be addressed.

MR. FARERI: When you say meeting, you're talking about the meeting with Mr. Levanowitz?

MR. SUTTON: I'm sorry. The September 18th meeting.

A. I'm not sure what was going to happen that day, Mike.

Q. Did you have any opportunity to present your position to the university regarding the suspension and discipline prior to the September 18th meeting?

A. Not at all.

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Q. When you came to this September 18th meeting where was that held?

A. Mr. Levanowitz's office.

Q. And do you remember what time of the day it was?

A. Morning, morning hours.

Q. And who was present?

A. David Marazas the Chief, Mr. Levanowitz, myself and Richard Connell.

Q. Was there a secretary present?

A. Yes, I'm sorry, there was a secretary. I don't know who she was. It was Mr. Levanowitz's secretary from what I understand.

Q. Was there anyone else present?

A. No.

Q. How long did the meeting take?

A. Fifteen minutes, somewhere around there.

Q. And what happened at the meeting?

A. Mr. Levanowitz asked me for my side of the story that happened on the 26th.

Q. And what did you tell him?

A. I told him what happened as far as me going to Mr. Crompton's house that morning. Going to his house that morning to the raid by the police, being taken to the barracks, what happened at the

[PAGE 16]

barracks and also what happened at the magistrate's office that day.

Q. Did you discuss at all whether you had possessed marijuana in the past?

A. At that meeting?

Q. At that meeting.

A. No.

Q. Did you discuss at that meeting whether or not you knew Crompton or Habhab were dealing in drugs?

A. No, we did not.

Q. Did Richard Connell speak at all?

A. No, everybody just listened to what I had to say that day.

Q. Now, other than what Mr. Levanowitz said in the beginning, that you could tell your story and you're telling your story, did anyone else saying anything at the meeting?

A. No, everybody was quiet, Mike.

Q. When you were done with telling what had happened, what happened then?

A. The meeting ended.

Q. Now, I'd like you, if you could, tell me basically what your version was that you presented to him, Mr. Levanowitz, at that meeting?

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MR. FARERI: You want him to restate what he--

MR. SUTTON: Well, I would like a summary of what he told Mr. Levanowitz.

A. A short summary, Mike, would be fine. Just that that morning I went to Mr. Crompton's house. That he called me to ask me what I was doing that day. I told him that I was going to my mother's to do some yard work for a birthday party for my nephew. I told Jim that I couldn't hang out with him that day that I had something to do, that I'd stop by and say hello. He only lives a block down the road from my mother. I showed up at his house earlier than he expected me to and I helped myself in since the door was opened. I went into his house, his apartment was unlit and I came down to the living room area of his house. I focused my attention on the TV. Jim was sitting on the couch at the time and I was telling him how I was ready to get going; I was in work clothes to do yard work and I just was in a hurry to get that over with. And I went to turn to his kitchen area to get a glass of water. I heard two men come down the hallway in plain, dark

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clothes and I was pushed to the ground.

Q. Now, was this a private home or an apartment building?

A. Mike, he lives in a basement apartment of a single house.

Q. And did you know prior to this raid by the police that Mr. Crompton was dealing in drugs?

A. No, usually I see him, Mr. Crompton, at his place of work.

Q. Okay. Prior to this raid did you think that Mr. Habhab was dealing in drugs?

A. No, I don't — Mike, I don't see him that often.

Q. Had you ever obtained any drugs from Mr. Crompton?

A. No.

Q. Had you ever obtained any drugs from Mr. Habhab?

A. No.

Q. Now, I'm going to go through the demotion and I know we'll be covering a lot of the things that I asked you about the suspension, but I just want to make sure --

A. All right, Mike.

Q. When was the first time you received

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Q. Now, when you went into the meeting with Mr. Levanowitz on the 18th, were you limited in any way in what you could say?

A. I'm not sure.

Q. Okay. Did they put a time limit on how much time you had to speak?

A. No.

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Q. Now, from the period that you were suspended until you were demoted to groundskeeper were you eventually paid for that period of time?

A. Yes, I was.

Q. And at what rate of pay were you paid?

A. It changed twice, Mike. First Mr. Levanowitz agreed to give me groundskeeper pay from the 26th to the day that he sent me the letter that I had to show up as a groundskeeper, about a month--from about two months of my arrest, Dave Pottiger, the local, he was able to talk Mr. Levanowitz into giving me police officers rate of

[PAGE 25]

pay for that month of my suspension. And Mr. Levanowitz gave me, again, the difference of the groundskeeper to the police officer in a paycheck.

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Q. As far as you know have you exhausted all your remedies under the union contract?

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A. Yes, I did.

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[PAGE 56]

Q. When you were initially suspended did you receive any notification of the suspension before you received the letter that Chief Marazas delivered?

A. No.

Q. Did you show up to work on the 4 to 12 shift on August 26th?

A. No, I did not.

Q. Why not?

A. They already--I was aware that they already knew of the charges brought against me. I just felt it wasn't--they were going to ask me to go home or something like that.

Q. Did you call in at all to see if you would not be working on the 4 to 12 shift?

A. No.

Q. How did you know that the university

[PAGE 57]

knew about the charges?

A. Trooper Freed told me that he talked to Dave Marazas. This is when I was at the barracks.

Q. Did you have any contact with the university Police the next day on August 27th?

A. I'm not sure. I may have called Dave but I'm not certain of that.

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Q. What was your understanding of the police aspects of the university police officers [sic] job?

A. Just small, you know, keeping an eye on the campus.

Q. Did you carry any weapons as a police officer?

A. Yes, we do.

Q. What kind of weapons?

A. 357's.

Q. Do you carry any other weapons?

A. No, I don't.

Q. Did you, as a university police officer, have access to any other weapons--

A. No.

Q. --to be used?

A. They have, I think, rifles there but I've never used them.

Q. All right. Did you carry your weapon off campus when you were off duty while you were a university police officer?

A. No, it was too bulky. I didn't see a need to.

Q. Did you carry any weapon as an off-duty officer?

[PAGE 60]

A. No.

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Q. Did you feel that the fact that you were involved in a situation where there were drugs present had any--that resulted in either your demotion or your suspension?

[PAGE 62]

A. It was part of it, yes.

Q. Does the university have a strong policy against drugs?

A. I would believe they do.

August 27, 1992

Mr. Rich Homar
421 King Street
East Stroudsburg, PA 18301

Dear Mr. Homar:

This is to notify you that you are to be suspended without pay, effective immediately on 8/26/92, from your position as a police officer at East Stroudsburg University pending further investigation and disposition of the charges filed against you by the Pennsylvania State Police on 8/26/92.

You will be advised in person or by certified mail of any change in your suspended employment status at the University. Please be advised that any administrative action that may be taken by the University as a result of criminal charges filed against you do [sic] not have to coincide with the disposition of those charges through the legal process.

You have the right to appeal this action through the provisions of the Collective Bargaining Agreement.

Sincerely,

Gerald S. Levanowitz, Director
Human Resource Management

GSL:meo

FOR: Dr. James Gilbert, President

PC: Dr. Curtis English
Chief Marazas
Ms. Donna London
Office Hughes
Mr. Dennis Eck, U.P.G.W.A. Representative
Personnel File

DEF'S EX. #1

200.1 DRINKING ANY KIND OF INTOXICATING LIQUOR WHILE ON DUTY OR COMING ON DUTY UNDER THE INFLUENCE OF INTOXICANTS OR NARCOTICS.

200.2 CONDUCT UNBECOMING TO AN EAST STROUDSBURG UNIVERSITY CAMPUS POLICE OFFICER. DEPARTMENT PERSONNEL WILL CONDUCT THEMSELVES ON AND OFF DUTY, IN A MANNER THAT WILL CREATE A FAVORABLE IMAGE OF THE DEPARTMENT. ANY OFFICER WHOSE ACTIONS CREATE A LOSS OF PUBLIC CONFIDENCE IN THE DEPARTMENT IS GUILTY OF GROSS MISCONDUCT.

200.3 IMMORAL CONDUCT, NEGLECT OF DUTY, VIOLATION OF ANY FEDERAL LAW, STATE LAW, OR LOCAL ORDINANCE, LOUNGING ON POST, INATTENTION TO DUTY, SLEEPING ON DUTY, AND DISORDERLY CONDUCT.

200.4 LEAVING POST OR CAMPUS, OR ABSENCE WITHOUT PERMISSION.

200.5 USING COARSE, PROFANE, OR INSOLENT LANGUAGE.

SECTION 200

1983

RULES OF CONDUCT

PERSONAL CONDUCT:

Department personnel in their contact with the public, are viewed as representatives of East Stroudsburg University. The public image of the East Stroudsburg University Campus Police Department is determined by the actions, conduct, and appearance of its department personnel . . .

The following Rules of Conduct establish standards of behavior and procedures in which all Department personnel must conform. Strict obedience to these rules and regulations and their execution of specific duties, responsibilities, and special orders assigned by your superior, will be expected and required of each officer.

Every member of this department shall be subject to reprimand, suspension or dismissal from the Department and from the service of the College, according to the nature of the offense, for any of the following causes or for violation of any other rules, regulations, or orders of this Department, now in force or that may hereafter be issued, after having been given an opportunity to be heard on his or her own defense . . .

DEF'S EX. #4

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD J. HOMAR, : **NO. 3:CV-93-0852**
:
Plaintiff :
v. :
:
JAMES E. GILBERT, et al., :
:
Defendants :

DEPOSITION OF GERALD LEVANOWITZ

[PAGE 4]

Q. Your full name, please?

A. Gerald Stanley Levanowitz.

Q. You're known as Jerry?

A. Yes.

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[PAGE 6]

Q. The numerous letters we have in this case indicate that you are Director of Human Resource Management?

A. Yes.

Q. That's a euphemism for personnel director?

A. The new buzzword.

Q. When did you become the director as opposed to assistant?

A. I came in November '79 as assistant director and I became director in '80. I'm not sure exactly what month.

Q. You've been director since then?

A. Yes.

Q. Have your duties remained constant over that tim period?

A. Pretty much so. They've expanded on a--taken on a few health and safety. And I also--at East Stroudsburg I run the patrol office as well, that's part of Human Resources.

Q. Could you just tell me what the duties of the Director of Human Resource Management would have been during the periods in question and relevance in this case, which would be roughly August '92 up through the present time?

[PAGE 7]

A. Okay. I'll limit my description to as it relates to labor relations and employee relations matters because there's a whole bunch of the other. Essentially--

Q. That's fine.

A. Essentially I am in charge of conduct, labor management meetings with the various staff units on campus, which includes the United Plant Guard

Workers, AFSCME, Pennsylvania Nurse Association and the State College university Professional Association. And I administer those four contracts for the university. And it's under the president, he has designated me as his--I'm his designee for administering any kind of corrective or disciplinary action for infractions of any of those agreements and for sitting down and meeting and discussing and basically negotiating any side letters or any other agreements that we have to locally agree on that alters any of those agreements.

Q. The chief's testimony indicates that you play some role with respect to the police department in terms of disciplining employees, is that correct?

A. Yes it is correct.

Q. Could you describe for me what that role

[PAGE 8]

is?

A. Generally Dave said it. There was just one detail that I would add to what he said, that the counseling is always the responsibility of the department head, a written reprimand--and Dave wasn't too clear on this, but a written reprimand is generally the responsibility of the department head, the dean, director, whatever. Also, the next step being short suspension, one-day, two-days, whatever, three-days suspensions on up to termination. I'm the person responsible for administering those on behalf of the president.

Q. I take it from that testimony that you would be the person who actually would meet out that type of discipline rather than approving what somebody else had already done?

A. Yea, but I administer it because I sign for the President. He's the ultimate decision maker but that's been delegated to me.

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[PAGE 9]

Q. I want to see if I can be educated as to hierarchy. I think I understand it from the chief that the police department is under--was underneath Dr.English?

A. Yes, that's correct.

Q. Except for employee matters, then they would come to you, is that right?

A. Dr. English, it was his role at that time and the provost, serving a dual role now, but his role was Vice-President for Finance and Administration. One of the areas under that segment of our organization is Campus Police. I'm also under the same area. I report to the same vice-president that the chief reports to. It's Dr. English who is presently--currently the president.

Q. If that was a nonpersonnel matter, let's say, the chief had some certain concern of budget. Let's say he needed more money for badges or

[PAGE 10]

something, he would not bring that to--

A. Dr. English.

Q. But if it was an employee matter he would bring that to you?

A. That's correct, yes.

Q. Who is the employee head above you?

A. For contract relations?

Q. Yes.

A. Essentially I'm the delegate of the president to take action, but the vice-president is not cut out of that.

Q. So it would be the vice-president who would--at some of the times here was Dr. English, is that correct?

A. During that time it was, yes.

Q. And then it would have been President Gilbert?

A. Yes.

Q. Can you tell me in 1992 and 1993 at the times that were material to the events in this case were there any guidelines or regulations or laws or a policy and procedure manual that you followed in determining whether employees should be suspended?

A. We have an employee handbook that spells out very briefly a policy that we adhere to that's

[PAGE 11]

called Progressive Discipline. And basically what that outlines is the counseling, verbal warnings, written warnings, suspension, longer suspensions, terminations, it doesn't address--specifically address demotions. But there are--there is a language in the collective bargaining agreements that speaks to demotions.

Q. Was there any--were you aware of any, again, any regulation, wills, policies, laws, regulations, that imposed any specific legal requirements upon you prior to determining that an employee would be suspended for any reason?

A. Yes. Yeah, we've, you know, I've had experience with and I'm not sure you know in reference to policy, but I've had experience with and dealings previously with rights and, you know, notices, hearings, whatever and protocol that would normally be observed.

Q. Was that--in your department was that reduced to writing in any fashion?

A. Well, I guess not in our policy. I have labor relations updates. I subscribe to a couple of labor relations updates, journals that come out and I read those things continually.

Q. Do I take it from your testimony that I

[PAGE 12]

would be correct that the university did not have any written policy or procedures per se that dealt with what you were to do in terms of making the decision to suspend somebody?

A. The only policy is not a university policy, it's a Commonwealth policy, as the Governor's Codes of Conduct.

Q. Was that in the form of a Governor's Executive Order?

MR. SUTTON: Just for clarification, you're asking other than the Union, correct? Is that right?

MR. FARERI: Yes.

A. Because it is spelled out in there as well.

Q. I believe a copy of that executive order was provided and we won't mark this as an exhibit. Would that be executive order number 1980-18, is that what you're talking about?

A. Yes, and I guess this is the most recent version. They update these from time to time, but this is the one, yes.

Q. That's the one I received from your counsel.

[PAGE 13]

A. Yes.

Q. Is it your testimony that you would be obliged to follow what is stated in here in terms of properly effectuating a suspension of a university employee?

A. I guess, I'm not sure that I would choose the word obliged, but I did refer to this and let it guide my actions somewhat in this case, yes.

Q. We'll ask you some more questions about that later. Let's talk specifically about this particular case. First of all, prior to August 26, 1992 that was the date that Mr. Homar was arrested, did you know Mr. Homar?

A. Yes, I did.

Q. How did you know him?

A. When we were--when we hired him as a laborer. I guess, originally, as a temporary laborer.

Q. So you would know him as one of the employees at the school?

A. As a groundskeeper. His mother works for us also.

Q. Do you know him other than through the university?

[PAGE 14]

A. No.

***

[PAGE 16]

that he had smoked marijuana in high school. And that was the first time I knew about it.

Q. But there was no doubt in your mind that the Police, Hess and May and the chief were aware of that before he was hired?

A. That the documents appear to indicate that, yes.

Q. You may want to refer to this, I'm referring to Plaintiff's Exhibit Number 1, which I referred to during the subsequent questions. That is a document prepared by yourself?

A. Yes, it is, yes.

Q. And is that basically a chronological statement of the — some of the actions that occurred pertaining to the disciplining of Mr. Homar?

A. Yes. Yes, it is, yes.

Q. Can you tell me when you prepared that?

A. I'm thinking that it was sometime in October of '92.

Q. Was that prepared from notes that you had made contemporaneously or basically from your recollection?

A. Mostly from memory, but I referred to my desk calendar for appointments, you know, that kind

[PAGE 17]

of thing. And I – sometime in October kind of realized that hey, you know, some of these things are getting a little fuzzy so you better reduce it, you know, you better try to come up with some kind of a chronological sequence while it's still fresh.

Q. I'm going to ask you some questions particularly about Mr. Homar, when did you discover that he had been arrested?

A. Chief Marazas notified me by phone on the afternoon of that day.

Q. The chief, I think, testified that he had notified you sometime in the later afternoon on that date, would that be fair?

A. Around 3, 3:30 somewhere around there.

Q. Does your first notation there in Exhibit 1, Number 1 under 8-26 indicate that that's what happened?

A. Yes.

Q. Does that note indicate that you received two notifications from the chief that day that he had been arrested?

A. Yes, um-humm.

Q. The second one he indicated that the charge had been established as the three charges you have set forth here?

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A. That was the information, yes. The information was given to me on the second phone call that day.

Q. The chief also testified to a meeting that occurred between himself, you and Cindy Bogart at your office, which according to the chief's notes occurred at approximately 3:40 on August 26. Do you remember that?

A. That was after the second phone call, yes.

Q. That's not something that you describe in these notes?

A. No, I didn't, no.

Q. At that meeting the suspension of Mr. Homar was discussed?

A. Yes. I might add the reason that isn't mentioned is because it wasn't on my desk calendar, the things that I was referring to when I made this up, one of them was my desk calendar. That was an impromptu meeting.

Q. Do you remember that meeting?

A. Yes, yes.

Q. What occurred at that meeting?

A. The chief advised me that he had gotten the initial phone call. That it was--and I don't

[PAGE 19]

recall specifically if it was Trooper Freed but Chief Marazas has indicated that that's who it was. That Mr. Homar had been picked up in a narcotics raid. That they had some indication at that time that he may have just been in the wrong place at the wrong time and/or since they knew, I guess, somehow and I'm not sure how, that he was a university Police Officer they gave the chief a courtesy call. Asked him to sit tight for a little while until they could sift things out a little bit more to get back to him. And he got back to them--he indicated to me that he had gotten back to them and that they then told him that he had--they had established more information and are aware now of the belief that there was deeper involvement and that the charges had been expanded.

Q. That was discussed at this meeting?

A. Yes.

Q. Was it discussed whether or not to suspend Officer Homar?

A. Yes, it was. And the decision to suspend was actually made in consultation, not only, with the chief at that time but with Dr. English and the President.

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Q. Was Dr. English at the meeting?

A. No, he was not.

Q. Was the President at the meeting?

A. No, he was not.

Q. At the meeting did you have a recommendation as to what should occur?

A. I really don't remember if I called the President and Dr. English after I met with the chief or--

Q. Did you make a recommendation to Dr. English or the President?

A. Yes, I did.

Q. What was that?

A. To suspend immediately.

Q. With or without pay?

A. Without.

Q. And when you were considering whether or not to do a suspension were you following any set criteria as to things that you were to consider or to do in terms of making a decision whether or not to suspend?

A. No--well, the criteria was as outlined in the Governor's Code of Conduct. And specifically since one charge at that time--and my understanding is that the arraignment had--it was

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either occurring at that time or had already occurred and that one of the charges was a felony charge and that's the conspiracy charge. And that the Code of Conduct makes a reference to investigation after suspension in cases where one of the charges is a felony.

Q. So you consulted the Code of Conduct?

A. Yes, and I also made a call to Harrisburg.

Q. Who did you talk to there?

A. The Labor Relations people, the chancellor's office.

Q. Do you remember who it was that you talked to?

A. I really don't. Normally it would be Mary Todaro, but I don't remember.

Q. Are these attorneys or--

A. No, they're labor relations specialists.

Q. Did you get advice from them?

A. Yes, I did.

Q. What was that advice?

A. That was the--concurred with my feeling that I had already arrived at, was that we should suspend. But I don't recall even to tell you the truth, whether it was discussed with Labor

[PAGE 22]

Relations as to whether it was with or without pay.

Q. You agree with me that at the time that decision was made Mr. Homar was not--prior to you making that decision Mr. Homar was not notified?

A. Yes, that's true. That's correct.

Q. And the letter that was sent, that was then prepared by yourself advising him that he was suspended, it's Plaintiff's Exhibit Number 2?

A. Yes, right.

Q. You wrote that letter?

A. Yes, I did, yes.

Q. Did you have to--before you wrote the letter did anybody assist you with drafting the letter or review the language of the letter?

A. No.

Q. You testified you contacted Dr. English and the President, and did they agree with your suggestion, the course of action?

A. Yes.

Q. Which was to suspend without pay?

A. Yes.

Q. And am I correct based on this letter the reason that Officer Homar was suspended was because of the charges that had been filed by the Pennsylvania State Police on August 26, 1992?

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[PAGE 23]

A. Yes.

[PAGE 24]

Q. Did you become aware that the charges were dismissed at the preliminary hearing?

A. Yes, I was aware. I guess I read it in the Pocono Record.

Q. It was in the paper the next day?

A. Yes, um-humm.

Q. The preliminary hearing occurred September 1st, 1992. So is it a fair conclusion that on September 2nd you were aware that the charges were dismissed?

A. Um-humm.

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When you became aware the charges had been dismissed the suspension was not lifted, is that correct?

A. That's correct.

Q. Did you make any determination — withdraw that. Did you consider lifting the suspension when the charges were dismissed at the preliminary hearing?

A I considered it. As I indicated in the suspension letter that, you know, the disposition of the disciplinary process did not necessarily have to coincide with the disposition of the criminal charges.

Q. Did you feel, after the charges were dismissed, did you feel that there was still something that had to be investigated?

A. Yes.

Q. What was that?

A. Well, the--what was the date of the magistrate's hearing?

Q. September 1st, 1992.

A. Yeah, September 1st that I really at that point had not gotten anywhere near gathering the information that I needed. I didn't meet with

[PAGE 26]

the State Police until ten days later. So at that point I really didn't have what I figured that there should be to at least have one-on-one or a face-to-face contact or some kind of contact with the special agent and the State Police which hadn't occurred yet.

Q. What specifically did you want to find out from the State Police?

A. Just the events that took place that day. And Chief Marazas had already indicated to me the sudden shift or the marked change in the attitude of the police from the first phone call to the second. And that they had said at the second phone call that he, Mr. Homar, was a lot more deeply involved in this than they had originally thought.

Q. You also indicate in this note that we just referred to Exhibit Number 1, that you spoke to Assistant District Attorney Curtis Rogers, when was that?

A. I spoke to him on the phone. I really--I couldn't give you a date but it was--it was before the meeting with the--between the magistrate's hearing and the meeting that I had with the State Police.

Q. Did you ask Attorney Rogers whether the

[PAGE 27]

Commonwealth intended to refile the charges against Mr. Homar?

A. I asked him at one time but I don't recall when I--I don't believe it was at this time, I believe it was later.

***

[PAGE 50]

Q. Prior to the meeting of September 18, did you ever issue to Mr. Homar any decision in writing advising him of the matter that you were considering in determining his employment status?

A. Pardon me?

Q. I'll repeat the question. Prior to the meeting of September the 18th, did you ever issue to Mr. Homar any additional letter or memo or any other writing advising him of any issues that you were considering in determining what to do with respect to his employment status?

A. No, I did not.

Q. Am I correct that the only writing that Mr. Homar would have had received from you as of the date of this meeting on September 18, would have

[PAGE 51]

been the letter advising him that he had been suspended pending further investigation and disposition of the charges filed against him by the Pennsylvania State Police?

A. That was prior to the 18th?

Q. Yes, sir.

A. Yes, sir.

***

Gerald Levanowitz

8-26-92
I was notified by Chief Marazas that ESU Police Officer Richard Homar had been arrested by the State Police in a narcotics raid. The charges at that time were not specifically known but were thought to be possession of a controlled substance (marijuana). Later the same day, Chief Marazas informed me that the charges were now established as (1) Possession with intent to deliver a controlled substance; (2) Possession of a controlled substance and; (3) criminal conspiracy. I also learned that Mr. Homar had been arraigned on these charges and had been released on his own recognizance.

8-27-92
I wrote a suspension letter to Mr. Homar and said letter was hand delivered by Chief Marazas and Officer Bogart.

8-31-92 to 9-11-92
Spoke several times to State Police and SSHE Labor Relations Office on phone and finally set up a meeting with State Police on 9-11-92 at 11:00 A.M. Trooper Freed who was a key person in the arrest and charges was on vacation during this time. Also spoke to Assistant District Attorney Curtis Rogers who stated disbelief that Magistrate Eyer dropped charges. I asked for a copy of transcript of preliminary hearing and was told I would have to get from Attorney Ferrari. I did not follow up on this for obvious reasons.

9-11-92
Met with Trooper George, Trooper Raab and Corporal Sartori. I received a copy of Mr. Homar's statement (copy attached) given to State Police on 8-26-92, the search warrant, the arrest warrant affidavit and the criminal complaint all issued on 8-26-92 by Magistrate Eyer. Troopers George and Raab both are willing to give us their own statement and/or testify at an administrative hearing that Mr. Homar gave them his statement after agreeing to a waiver of rights. Trooper George said that when he entered the Crompton

residence on August 26, 1992, Mr. Homar was seated on a sofa in the living room of the house. When Trooper George yelled State Police and entered the house, Mr. Homar got up and moved quickly toward the kitchen of the residence. Troopers George saw a metallic object flashing/flying from Mr. Homar's direction which he thought might be a gun then he drew his weapon. Trooper George related that the metallic object later turned out to be a metal plate used for processing and cutting marijuana. Trooper George and Raab told me that there were four marijuana "joints" on a coffee table where Mr. Homar had been sitting and one of the joints was half burned and there was a heavy odor of marijuana smoke in the house. They told me that a search of the premises turned up a triple beam scale, five pounds of marijuana and paraphernalia.

9-15-92
I called Mr. Homar and set up a meeting in my office for 9-18-92 at 11:00 A.M. I told Mr. Homar that the purpose of the meeting was to give him an opportunity to tell his version of the events of 8-26-92 through 9-1-92 and to offer any information on his behalf that would be helpful, I told him at that time that he had a right to union representation since this was an administrative hearing but he did not have a right to attendance by legal counsel.

PL'S EX. #1

PL.'S EX. #14
11-5-93

Approx. 1315 hrs. (Aug 16) received a call from Tr. Fredd Swiftwater P.S.P. Had Homar in custody drug raid. No details.

Approx. 1520 Aug 26 contacted Tr. Freed. Stated charging Homar and taking him for arraignment charges possession & possession with intent to deliver.

Approx. 1540-1630 (Aug 26) met with Jerry Levanowitz present Cindy & myself. Determined Homar would be suspended told John May & Bob Conger Homar shows up for work he is to be set home. Can get any personal possessions from HQ.

Aug 27th btw 1215-1253. Homar called told me he was arrested. Asked if he was suspended. Replied yes told him I would deliver by hand a letter to him at 1430 hrs.

Aug. 27th 1456 Cindy and I delivered letter to Homar outside his residence at King St. Told Homar he could pick up any personal possessions, but he is suspended until he hears from us.

EAST STROUDSBURG UNIVERSITY
EAST STROUDSBURG, PA 18301-2999

September 23, 1992

Mr. Richard J. Homar
421 King Street
East Stroudsburg, PA 18301

Dear Mr. Homar:

This is to inform you that you are to be demoted from your position as a Police Officer 1 in the Campus Police Department to the position of Groundskeeper, a position which you formerly held. This actin is effective retroactive to August 26, 1992, and you are to be given back pay to that date at the rate of pay for a Groundskeeper. You are to report work at 7:00 A.M. on September 24, 1992 at the Facilities Management Office. Your new rate of pay as a Groundskeeper will be $552.80 bi-weekly.

This action is being taken as a result of admissions made by yourself to the Pennsylvania State Police on August 26, 1992 that you maintained associations with individuals whom you knew were dealing in large quantities of marijuana and that you obtained marijuana from one of those individuals for your own use. Your actions constitute a clear and flagrant violation of Sections 200 and 200.2 of the East Stroudsburg University Police Department Manual.

As you must know, Police Officers are held accountable for a higher standard of conduct than is the rest of the population. Maintaining these associations and admitted use of a controlled substance is a degradation of that standard that cannot be tolerated.

The services offered through the Employee Assistance Program are available to you. Should you choose to look into this, please contact Ms. Susan McGarry who is the campus coordinator for the program or you can get help by calling the State Employee

Assistance Program at the following toll free number 1-800-692-7459.

You have a right to grieve this action through the applicable provisions of the United Plant Guard Workers of America collective bargaining agreement.

Sincerely,

Gerald S. Levanowitz, Director
Human Resources Management

FOR: James E. Gilbert, President

PC: Dr. Curtis English
Chief David Marazzs
Officer Richard Connell
Mr. Dennis Eck, UPGWA
Ms. Donna London
Personnel File

DEFENDANT'S
EXHIBIT
2
11-5-93

(6)

Supreme Court, U. S.
FILED
FEB 11 1997
CLERK

No. 96-651

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAMES E. GILBERT, ET AL.,
Petitioners

vs.

RICHARD J. HOMAR,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

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32 pp

QUESTION PRESENTED

Whether the suspension without pay of a public employee always, regardless of circumstances, requires a pre-suspension hearing?

LIST OF PARTIES

The petitioners are four officials of East Stroudsburg University-part of the State System of Higher Education: President James E. Gilbert, Director of Human Resources Gerald Levanowitz; Police Chief David Marazas; and Vice-President Curtis English.

The respondent is Richard J. Homar, formerly a campus police officer and now a groundskeeper at the University.

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The opinion and order of the Court of Appeals are reported at 89 F.3d 1009 (3d Cir. 1996) and are reprinted in the Petitioners' Appendix at 1a. The Opinion and order of the district court are not reported but are reprinted in the Petitioners' Appendix at 47a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was filed on July 18, 1996, and the petition for certiorari was filed within ninety days thereafter on October 16, 1996. The Court granted certiorari by order of January 3, 1997 and has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

1. The Fourteenth Amendment's Due Process Clause provides in relevant part that "No State shall... deprive any person of life, liberty, or property, without due process of law." U.S. Const., Art. XIV, §1.

2. The regulations contained in Title 4, Sections 7.172 and 7.173 of the Pennsylvania Code provide in relevant part as follows:

§ 7.172. Definitions.

* * * * *

Employe — Individuals employed by, or appointed to serve on, an agency, board, commission or department of the Commonwealth....

Formally charged with criminal conduct — An employe shall be deemed to be formally charged with criminal conduct when he has been arrested or named as a defendant in an indictment or information or, in the case of a private complaint, the complaint has been approved by the prosecuting authority.

* * * * *

§ 7.173. Required action when an employe is formally charged with criminal conduct related to his employment with the Commonwealth or which constitutes a felony.

As soon as practicable after an employee has been formally charged with criminal conduct related to his employment with the Commonwealth or which constitutes a felony, the employe shall be suspended without pay. If the charge results in conviction in a court of law, the employe shall be terminated.

STATEMENT OF THE CASE

The issue presented is whether due process requires a public employer to provide a hearing in every instance before suspending an employee without pay. The case arises from a public employee's challenge to his discipline following his arrest on drug charges. The petitioners are four officials of East Stroudsburg University, part of Pennsylvania's State System of Higher Education, President James E. Gilbert; Director of Human Resources Gerald Levanowitz; Police Chief David Marazas; and Vice-President Curtis English. J.A. 4a-5a. The respondent is Richard J. Homar, a tenured Commonwealth employee who was formerly a member of the University's police force who is now employed by the University as a groundskeeper. J.A. 5a, 39a.

1. On August 26, 1992, members of the Pennsylvania State Police arrested Homar during a drug raid at the home of a friend. J.A. 6a, 26a, 50a-51a. The State Police charged Homar with possession of marijuana, possession with intent to deliver, and criminal conspiracy, a felony. J.A. 6a, 26a. The State Police informed Chief Marazas, Homar's supervisor, of Homar's arrest and the charges against him, *id.* at 26a; and Marazas in turn told Human Resources Director Levanowitz, to whom President Gilbert had delegated authority to discipline and suspend university employees. *Id.* at 25a-26a, 61a-62a. The Pennsylvania Administrative Code, applicable to Commonwealth employees, requires that "as soon as practicable" after being charged with a felony, "the employee shall be suspended without pay." 4 Pa. Code §7.173 (1996). An employee who has been arrested is deemed "formally charged" with criminal conduct. 4 Pa. Code §7.172. If a charge results in a conviction, the Code requires that the employee be terminated. 4 Pa. Code §7.173. Therefore, Levanowitz suspended Homar wihtout pay. J.A. 27a.

Homar did not report to work that day. J.A. 53a-54a.

The next day, however, he called Chief Marazas, told him that he had been arrested, and asked whether he was suspended. *Id.* at 81a. Marazas told him that he was, and later that day delivered to Homar a letter from Levanowitz. *Id.* at 41a, 57a, 81a. The letter confirmed that Homar was suspended pending further investigation, and explained that the University's final decision in the matter would not necessarily coincide with disposition of the criminal charges against him. *Id.* at 57a.

The criminal charges against Homar were dismissed on September 1, 1992, while the University's investigation concerning him was underway. J.A. 7a, 28a, 75a-76a. At a meeting on September 11, 1992, the State Police gave Levanowitz its investigative file on Homar, called the "Supplemental Report." *Id* at 28a. The report included statements attributed to Homar that he allegedly made to the State Police shortly after his arrest. Pet. App. 4a. According to the report, Homar admitted his knowledge of drug dealing by his friend Crompton and another man named Habhab, and that he had received marijuana from Habhab for his own use while employed at the University as a police officer. *Id.*

On September 18, Levanowitz and Marazas met with Homar and his union representative. J.A. 29a, 48a. Levanowitz told Homar that he had completed his investigation and that he had received some "very serious" evidence concerning Homar from the State Police. Pet. App. 5a. Levanowitz asked Homar to detail what had happened on the day of his arrest, and Homar complied. J.A. 30a, 49a, 50a-51a. By letter dated September 23, Levanowitz demoted Homar to the position of groundskeeper. *Id.* at 30a-31a, 82a. Homar was eventually paid for the period of his suspension at the rate of a police officer. *Id.* at 33a, 52a-53a.

The next day, Homar and his union representative met with President Gilbert. J.A. 31a. Gilbert gave Homar an opportunity to respond to the charges and to Levanowitz's decision, but sustained the decision the same day. *Id.* at 32a.

2. Homar brought this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Middle District of Pennsylvania, seeking damages and reinstatement to his former position. J.A. 3a-4a, 13a, 15a. All of Homar's claims arose under the Fourteenth Amendment's Due Process Clause. *Id.* at 12a-15a. As relevant here, Homar claimed that the petitioners' failure to give him a hearing before suspending him violated his right to procedural due process.[1] *Id.*

The District Court rejected all of Homar's claims and granted the petitioners' motion for summary judgment. Pet. App. 74a. As to Homar's suspension without pay, the District Court applied the balancing test from *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). *Id.* at 60a. The District Court recognized that Homar had a strong private interest in continuing to receive his salary, but also held that the University had a compelling interest in preserving public confidence in law enforcement; and that under the circumstances, the likelihood of governmental error was slim. *Id.* Taking all these interests into account, and considering also that the deprivation suffered by Homar was both temporary and brief, the District Court held that postponing the hearing on Homar's suspension did not violate the Due Process Clause. Pet. App. 58a-63a.

3. A divided panel of the Court of Appeals reversed the District Court's decision on the suspension without pay issue.[2]

---

[1] Homar also claimed that the hearing given to him before his demotion was procedurally inadequate; that his suspension and demotion violated his right to substantive as well as procedural due process; and that the petitioners had deprived him of protected liberty, as well as property, interests. Pet. App. 63a-73a. None of these claims is before the Court.

[2] On Homar's other claims, the Court of Appeals reversed the District Court's decision on the adequacy of the hearing given to

Pet. App. 7a-17a. The majority agreed with the District Court that

> there was a compelling governmental interest which supports [the university's] decision to suspend Homar immediately and without a hearing pending further investigation. The university has a substantial interest in maintaining public confidence in [its] police force, and Homar's arrest on drug charges certainly suffices to ensure that the university' s concerns were not baseless or unwarranted ....

Pet. App. 11a. Nevertheless, the majority held that the petitioners had violated Homar's due process rights "because he was suspended *without pay.*" *Ibid* (emphasis in original).

The panel majority relied primarily on dicta from the Court's decision in *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985). In *Loudermill*, the Court discussed the possibility that a public employer might need to remove an employee immediately without hearing, and suggested that "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem *by suspending with pay.*" *Id.*, at 544-45, *quoted at* Pet. App. 11a (emphasis added by the Court of Appeals). This, in the view of the panel majority, "strongly suggests that suspension without pay must be preceded by notice and an opportunity to be heard *in all instances.*" *Ibid* (emphasis added).

The majority recognized that at least two other courts of appeals had considered the same language from *Loudermill* and had reached the contrary conclusion. Pet. App. 12a & n. 12,

---

Homar before his demotion, and on his substantive due process claim; but affirmed the District Court on his liberty interest claim. Pet. App. 17a-27a.

citing Engdahl v. Dept. of Navy, 900 F.2d 1572 (Fed. Cir. 1990) *and Bailey v. Board of County Com'rs of Alachua County*, 956 F.2d 1112 (11th Cir. 1992). They nevertheless held that "a governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing." Pet. App. 14a.

Judge Alito dissented from the majority's "blanket rule," Pet. App. 31a. Judge Alito relied on the Court's recognition in *Loudermill* that "[t]here are, of course, some situations in which a postdeprivation hearing will satisfy due process requirements," Pet. App. 31a, *quoting Loudermill*, 470 U.S. at 542 n.7, and on the Court's observation in *FDIC v. Mallen*, 486 U.S. 230 (1988), that

> [a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.

Id, at 240, *quoted at* Pet. App. 29a. He would have applied the balancing test of *Logan* and other cases, and would have held that under circumstances such as those presented by this case, there is no requirement that a public employer must pay its suspended employees. Pet. App. 30a. As to the dicta from *Loudermill* relied on by the majority, Judge Alito agreed with the *Engdahl* court that the Court's language in *Loudermill*

> is merely descriptive, not normative. We agree that in the instant case, the government could have suspended with pay. Nevertheless, we cannot read *Loudermill* as holding that the government must suspend him with pay.

Pet. App. 31a, *quoting Engdahl,* 900 F.2d at 1578.

The Court granted petitioners' petition for certiorari on January 3, 1997.

SUMMARY OF ARGUMENT

1. To affirm the Court of Appeals' decision, the Court would have to abandon its settled approach to the analysis of procedural due process issues. The Court of Appeals in this case engrafted onto the Due Process Clause a *per se* rule that suspension without pay of a tenured public employee "must be preceded by notice and an opportunity to be heard in all instances," Pet. App. 11a, regardless of the length of the suspension, the exigency of the circumstances surrounding it, and the likelihood that it is warranted. In marked contrast to this approach, however, the Court has consistently refused to invest the Due Process Clause with a "fixed content unrelated to time, place and circumstances," *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); and has specifically rejected the idea that due process "always requires the State to provide a hearing prior to [an] initial deprivation," *Parratt v. Taylor*, 451 U.S. 527, 540 (1981), of either liberty or property. Rather, the Court has required a particularized balancing of the private and governmental interests at stake, the risk of error, and the probable value of additional safeguards, *see Mathews v. Eldridge*, 424 U.S. 319 (1976) — an approach which, as the Court has recognized, leaves open the possibility that in some situations, due process may not require a pre-deprivation hearing.

This approach extends to employee suspensions. In *FDIC v. Mallen*, 486 U.S. 230 (1988), the Court strongly suggested that where the interest of the government is important, the risk of error is low, and the need for action is urgent, the opportunity to be heard may be postponed until after the suspension takes effect.

Nothing in the Court's earlier decision, *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985), changes this, or requires the *per se* rule imposed by the Court of Appeals. *Loudermill* itself was a straightforward application of the

Mathews balancing test to a particular set of circumstances, and gives no indication that the Court intended to depart from *Mathews* by imposing a rigid regime on all employee disciplinary actions, regardless of circumstances. The one sentence of dicta on which the Court of Appeals relied is thus too slender a reed to support its departure from the particularized *Mathews* analysis.

2. The *Mathews* analysis, properly applied, demonstrates that this is one of the limited class of cases in which the opportunity to be heard may properly be postponed until after the deprivation. First, the private interest involved — receiving an uninterrupted paycheck — while significant, is certainly of lesser magnitude than the private interest in *Loudermill*, which involved permanent termination from employment rather than a temporary suspension. Rather, the private interest here is analogous to those involved in *Barry v. Barchi*, 443 U.S. 55 (1979), and *FDIC v. Mallen, supra,* both cases where the Court approved pre-hearing suspensions. Second, as in *Mallen*, there is substantial assurance that the respondent's suspension was not baseless or unwarranted. The petitioners were informed by the State Police that the respondent had been arrested on a felony charge, a circumstance which, under the governing regulations, required them to suspend him. Third, the respondent is himself a police officer, and the governmental interests supporting his immediate suspension are, as the Court of Appeals recognized, "compelling." Pet. App. 11a. The rule imposed by the Court of Appeals — requiring either a pre-suspension hearing or a suspension *with pay* — improperly requires the government to trade off its interests in effective law enforcement, and public confidence in its police force, against its interest in its own financial integrity.

ARGUMENT

I. The Due Process Clause Does Not Require a Public Employer Invariably to Provide a Hearing Before Suspending a Tenured Employee Without Pay.

A. The Court has consistently recognized that in limited situations, due process does not require a pre-deprivation hearing.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court considered whether the termination of social security disability benefits must be preceded by an evidentiary hearing. The Court surveyed its prior due process decisions and found that they

> underscore the truism that " '[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

424 U.S. at 334.

The Court in *Mathews* drew from its earlier decisions a frequently quoted analytical framework for determining what, if any, pre-deprivation process is required.

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable

> value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id., at 335.

The model for evaluating procedural due process claims which the Court distilled in *Mathews* has been used ever since. Whatever the nature of the interest asserted, or the end result of the Court's analysis, it has consistently used the *Mathews* test or some close variation of it. *See e.g., Ingraham v. Wright*, 430 U.S. 651, 675 (1977) (imposition of corporal punishment in public schools); *Zinermon v. Burch*, 494 U.S. 113, 127 (1990) (admission to mental institution); *Connecticut v. Doehr*, 501 U.S. 1, 10 (1991) (prejudgment attachment of real estate); *United States v. James Daniel Good Real Property*, 510 U.S. 43, __, 114 S.Ct. 492, 496 (1993) (seizure of real property subject to civil forfeiture). More importantly for this case, the Court has adhered to this approach in analyzing procedural due process claims asserted by tenured public employees. *See Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542-43 (1985); *FDIC v. Mallen*, 486 U.S. 230, 242 (1988).

The hallmark of the approach summarized in *Mathews* is, of course, its flexibility to "time, place, and circumstances," *Cafeteria Workers v. McElroy*, 367 U.S. at 895 — its refusal to prescribe "inflexible procedures universally applicable to every imaginable situation." *Ibid.* Thus, for example, the denial of welfare benefits must be preceded by the opportunity for a full adversarial evidentiary hearing, *Goldberg v. Kelly*, 397 U.S. 254, 266-71 (1970); but the denial of disability benefits requires only the opportunity to review the tentative decision of the agency and the information upon which it relies, and to submit additional evidence and arguments in writing. *Mathews v. Eldridge*, 424

U.S. at 343-47. A prisoner facing revocation of good-time credits is entitled to written notice and findings, and a limited right to present witnesses and other evidence, but not confrontation, cross-examination, or counsel, *Wolff v. McDonnell*, 418 U.S. 539 (1974); while a tenured public employee facing termination is entitled only to oral notice of the charges, an explanation of the employer's evidence, and an opportunity to present his side of the story. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. at 546.

Furthermore, while "the Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property," *Zinermon v. Burch*, 494 U.S. at 127 (emphasis added), the rule is not invariable.

> In some circumstances ... the Court has held that a ... postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process.... "[T]he necessity of quick action by the State or the impracticality of providing any predeprivation process" may mean that a postdeprivation remedy is constitutionally adequate.... "Where the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures ... are sufficiently reliable to minimize the risk of erroneous determination," a prior hearing may not be required.

Id., at 128, *quoting Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 426 (1982) and *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978) (other internal quotations and citations omitted).

> We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but

> only in "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."

United States v. James Daniel Good Real Property, 510 U.S. at __, 114 S.Ct. at 501, *quoting Fuentes v. Shevin*, 407 U.S. 67, 82 (1972)(other internal quotations omitted).

Thus, no pre-deprivation hearing is required before the corporal punishment of a junior high school student, *Ingraham v. Wright, supra*; the random and unauthorized loss of private property in the custody of a state official, whether negligent, *Parratt v. Taylor, supra*, or intentional, *Hudson v. Palmer*, 468 U.S. 517 (1984); the suspension of a racing horse trainer's license, *Barry v. Barchi*, 443 U.S. 55 (1979); or the seizure of a yacht subject to civil forfeiture, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

Most relevant here, the Court has strongly suggested that, where the interest of the government is important, the circumstances are exigent, and the risk of error is low, the government may temporarily suspend an employee without pay, even in the absence of any prior opportunity to be heard. In *FDIC v. Mallen*, 486 U.S. 230 (1988), the president of a federally insured bank was indicted for making false statements to federal regulators and others. The Federal Deposit Insurance Corporation, pursuant to its statutory authority, issued an ex parte order finding that his continued service might "pose a threat to the interests of the bank's depositors" or "threaten to impair public confidence in the bank," and suspending him from his position pending an administrative hearing. *Id.*, at 236-38.

Mallen, who challenged the adequacy of his post-suspension hearing, "[did] not contend that he was entitled to be heard prior to the order of suspension," *id.*, at 240, but the Court nevertheless took pains to emphasize that it, too, found no need for a pre-suspension hearing. Citing its earlier decision in *Barry* *v. Barchi, supra,* the Court pointed out that

> [a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.

486 U.S. at 240. The government's interest in protecting depositors and maintaining public confidence in the banking system "is certainly as significant as the State's interest in preserving the integrity of the sport of horse racing," the interest found sufficient in *Barchi*. *Mallen*, 486 U.S. at 241. Moreover, Mallen's indictment by a grand jury, although an ex parte proceeding, provided "substantial assurance" against a "baseless or unwarranted" suspension.

> Such an ex parte finding of probable cause provides a sufficient basis for an arrest, which of course constitutes a temporary deprivation of liberty.... It should certainly be sufficient ... to support the [suspension] order ..., even though the FDIC did not provide appellee with a separate pre-suspension hearing.

Ibid. While the discussion of this point in *Mallen* is of course dicta, it nevertheless underlines the Court's continuing recognition that due process does not necessarily require a pre-deprivation hearing under all circumstances.

B. *Loudermill* did not establish a per se rule governing suspensions of tenured public employees.

The Court of Appeals, however, invoked the Court's decision in *Cleveland Bd. of Education v. Loudermill, supra,* to justify its imposition of a blanket rule to govern all suspensions without pay of tenured public employees. Pet. App. 11a-14a. In *Loudermill*, the Court considered the due process rights of public employees facing termination of their employment, and held that, before the termination takes effect, such employees must be given at least oral notice, an explanation of the employer's evidence, and an informal opportunity to present their side of the story. *Loudermill,* 470 U.S. at 545-46. Discussing the possibility that a governmental employer might need to remove an employee immediately without a hearing — a situation not presented in *Loudermill* itself, *id.,* at 545, n.10 — the Court said that "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." *Id.*, at 545-46. The Court of Appeals thought that this language "strongly suggests" that its blanket rule is constitutionally required, Pet. App. 11a, but this greatly overstates the case.

First, the statement relied on by the Court of Appeals is, of course, dicta. In *Loudermill*, as explained above, there was no suggestion that the need to remove the employees was exigent, and the quoted language was therefore not necessary to the case's result.

Second, *Loudermill* is itself a classic restatement of the flexible *Mathews v. Eldridge* analysis. The Court in *Loudermill* not only applied the three-part *Mathews* test, *Loudermill,* 470 U.S. at 543-45, but began its discussion with the recognition that "[t]here are, of course, some situations in which a postdeprivation hearing will satisfy due process requirements." *Id.*, at 542, n. 7, *citing Ewing v. Mytinger & Casselberry Inc.*, 339 U.S. 594 (1950) and *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908). In light of this, it would be odd indeed to find that *Loudermill* had departed from *Mathews* to establish a rigid rule to be applied without exception to cases, like this one, quite unlike itself.

Third, if *Loudermill* had indeed established, or even sanctioned, such a drastic departure from *Mathews*, it would surely have been mentioned, at least in passing, by the Court in *Mallen*. But as we have seen, *supra* at 15, the Court's discussion in *Mallen*, while dicta, is quite inconsistent with any such notion.

It is surely for these reasons that most of the lower courts to have considered the point have agreed with the dissenting judge from the Court of Appeals in this case that the Court's language in *Loudermill* "is merely descriptive, not normative." Pet. App. 31a (Alito, J., dissenting), *quoting Engdahl v. Dept. of Navy*, 900 F.2d 1572, 1578 (Fed. Cir. 1990).

The Court thus did not establish any blanket rule in *Loudermill*, and it should not do so now. The Court should rather adhere to its settled recognition that the flexible requirements of due process sometimes permit the government to dispense with a predeprivation hearing. As we now demonstrate, this is one of those cases.

II. The Respondent's Suspension Without Pay Did Not Violate The Due Process Clause.

The Court of Appeals' principal error, as we have explained, was to carve out an unqualified exception to settled due process jurisprudence so as to require a hearing before a tenured public employee could *ever* be deprived of pay, however briefly. But when the *Mathews* balancing test is applied to this case without the artificial constraints of the Court of Appeals' *per se* rule, it leads to the conclusion that the respondent's brief suspension without did not violate the Due

Process Clause. Rather, this case, like *Mallen*, is one where "an important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted" and the need for prompt action, "justif[ies] postponing the opportunity to be heard until after the initial deprivation." *Id.*, 486 U.S. at 240.

1. The first factor of the *Mathews* test to be considered is the nature of the private interest — here the interest in receiving an uninterrupted paycheck.[3]

Respondent's interest in an uninterrupted salary, while not insignificant, hardly weighs as heavily in the *Mathews* balance as other interests the Court has examined. The deprivation was temporary, the period without any paycheck of brief duration, and the loss — money — easily replaceable. Certainly it is a far cry from the claim to welfare benefits which the Court in *Goldberg v. Kelly*, 397 U.S. 257 (1970) characterized as the "brutal need" of persons on the very edge of subsistence. *Id.*, at 261. And the temporary loss of salary is of less import than the permanent loss of a job, which the Court in *Loudermill* said need be preceded only by an opportunity for an employee to "meet and discuss" the situation with the decisionmaker. *Id.*, 470 U.S. at 471.

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[3] The respondent was suspended without pay on August 27, 1995. J.A. 6a-7a, 27a, 57a. He met with the Director of Human Resources on September 18, 1995, and that meeting led to his demotion to groundskeeper, conveyed to him by letter of September 23, 1995, and effective retroactively to August 26, 1995, the date of his arrest. J.A. 8a, 29a-31a, 33a, 82a. He eventually received back pay from August 25 to September 24 at his previous rate of pay. J.A. 52a-53a, 82a.

The Court of Appeals erred by concluding that because a "suspension without pay [could] not be viewed as de minimus," it should be given virtually controlling weight in the *Mathews* analysis. Pet. App. 11a-16a. In doing so, the Court of Appeals failed properly to apply decisions of this Court which recognize that even substantial private interests may be interrupted prior to a hearing. In cases involving interests at least as important as Respondent's, the Court has said that, under the appropriate circumstances, no pre-deprivation hearing is necessary. *See FDIC v. Mallen*, 486 U.S. 230 (1988) (employment as bank president); citing *Barry v. Barchi*, 443 U.S. 55 (1979) (horse trainer's license); *Dixon v. Love*, 431 U.S. 105 (1977) (license to operate a motor vehicle); *See also, Ingraham v. Wright*, 430 U.S. 651 (1977) (corporal punishment); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (seizure of misbranded food supplement); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (seizure of food). Thus, though concededly not de minimus, Respondent's interest in an uninterrupted paycheck is not sufficiently important of itself to outweigh every other factor in the *Mathews* analysis.

2. The second factor is the value of additional or substitute procedural safeguards. Here, little useful purpose would have been served by additional pre-deprivation safeguards.

The administrative regulations applicable to Commonwealth employees require that an employee be suspended without pay "as soon as practicable" after being formally charged with a felony. 4 Pa. Code §7. 173, reprinted *supra* at 3.[4] This is thus not a situation like the one described by the Court in *Loudermill.* In that case, Loudermill's dismissal turned on a question of credibility — whether he had lied about prior convictions on his job application. 470 U.S. at 544 n.9.[5] In addition, Loudermill's termination, assuming that he had in fact lied, was not mandatory but discretionary with his employer. In that context, the Court observed that

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[4] The regulation provides in full that "[a]s soon as practicable after an employee has been formally charged with criminal conduct related to his employment with the Commonwealth or which constitutes a felony, the employe shall be suspended without pay. If

> even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decision-maker is likely to be before the termination takes effect.

470 U.S. and 543. Here, by contrast, state law *required* that any employee be suspended without pay "as soon as practicable" after being charged with a felony.

Respondent's suspension thus presented no issues of either credibility or discretion. The only issues were whether he had or had not been arrested, and whether he had or had not been charged with a felony, and on these issues the information received from the State Police, as the Court of Appeals recognized, "certainly suffices to ensure that the university's concerns were not baseless or unwarranted." Pet. App. 11a. *Cf. Mallen*, 486 U.S. at 241 (grand jury indictment of bank president, although ex parte, sufficient support for pre-hearing suspension). In fact, respondent has never denied that he was arrested and charged with a felony, and so it remains quite unclear just what function could have been served by additional process.

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the charge results in conviction in a court of law, the employe shall be terminated."

[5] In the consolidated case, a school bus mechanic had been discharged because he failed an eye examination.

3. The third *Mathews* factor — the interest of the government — the Court of Appeals properly characterized as "compelling", noting that "the university has a substantial interest in maintaining public confidence in the ESU police force." Pet. App. 11a. In this, of course, the Court of Appeals was quite correct. The government's interest in promptly suspending a law enforcement officer who has been charged with a felony can hardly be characterized as less than compelling, not only for reasons of public confidence, as the Court of Appeals observed, but for obvious reasons of effective law enforcement and morale among fellow officers as well. The Court has long recognized similarly compelling governmental interests in a variety of contexts. *See e.g. Ewing v. Mytinger and Casselberry, Inc.*, 339 U.S. 594 (1950) (important government interest in protecting the public from contaminated foods); *Phillips v. Commissioner*, 398 U.S. 589 (1931) (important governmental interest in collecting the internal revenue of the United States); *Barry v. Barchi*, 443 U.S. 55 (1979) (important governmental interest in assuring the integrity of horse racing); *FDIC v. Mallen*, 486 U.S. 230 (1988) (important governmental interest in protecting integrity of, and public confidence in, banking institutions).

The Court of Appeals contended that the government's interest in such cases could always be accommodated by suspending the employee with pay pending a hearing. In other words, the government's only recourse is either to engage in a pointless hearing, or to extend a paid vacation to the affected employee. This rule hardly

> does ... justice to the state's interest in financial integrity and its interest in promptly terminating an employee who has violated the conditions of his tenure and ignores [the state's] practice of paying back wages to wrongfully - discharged employees.

Loudermill, 470 U.S. at 563 n.1 (Rehnquist, J., dissenting).

Based on the *Mathews* analysis, the judgment of the Court of Appeals should be reversed. Respondent's interest in the uninterrupted receipt of his paycheck simply does not outweigh the government's compelling interest in promptly removing a law enforcement officer who has been charged with a felony.

CONCLUSION

For these reasons, the Court should reverse the judgment of the Court of Appeals on the respondent's suspension-without-pay claim, and remand the case to that Court with directions to affirm the judgment of the District Court on that claim.

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February 11, 1997

(13)

Supreme Court, U.S.
FILED
MAR 7 1997
CLERK

No. 96-651

In The

Supreme Court of the United States

October Term, 1996

◆

JAMES E. GILBERT, ET AL.,

Petitioners,

vs.

RICHARD J. HOMAR,

Respondent.

◆

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

◆

BRIEF FOR RESPONDENT, RICHARD J. HOMAR

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QUESTION PRESENTED

Whether the due process clause requires a tenured public employee to be afforded notice and an opportunity to be heard prior to being indefinitely suspended, without pay, solely on the basis of such employee's warrantless arrest?

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STATEMENT OF THE CASE

1. Respondent, Richard J. Homar (hereinafter "Homar"), was hired as a Police Officer I at East Stroudsburg University (hereinafter "ESU") on February 10, 1992.[1] The position of Police Officer I is subject to a collective bargaining agreement between the Commonwealth of Pennsylvania as employer and the International Union, United Plan Card Workers of America, as bargaining agent. J.A. 6a. Homar successfully completed a six-month probationary period, and therefore became fully tenured in his position in accordance with terms of the collective bargaining agreement. J.A. 5a; Pet. App. 58a-59a.

On the morning of August 26, 1992, Homar was present at the home of an acquaintance, James Crompton, who lived near by Homar's mother, when the Pennsylvania State Police executed a search warrant on the Crompton premises.[2] J.A. 6a, 50a-51a. Homar was not on duty at the time the search warrant was executed. After execution of the search warrant, Homar was arrested by the State Police and charged with possession of marijuana, possession with intent to deliver marijuana and criminal conspiracy. Pet.App. 3a.

The arrest was made incident to the search. The Pennsylvania State Police did not have an arrest warrant for Homar at the time the arrest was made and had no reason to suspect that Homar was even at the premises.

---

[1] Homar was previously employed by ESU for a period of approximately four years as a Groundskeeper, the position to which he was subsequently demoted. J.A. 5a.

[2] The State Police initially told Levanowitz that Homar "may have been at the wrong place at the wrong time." J.A. 70a.

After consultation with Respondent's immediate supervisor, Chief David Maravas, the Director of Human Resources at ESU, Gerald Levanowitz, determined to suspend Homar without pay. J.A.70a-71a, 79a. Homar was notified by personal delivery of a letter of suspension signed by Levanowitz dated August 27, 1992. J.A. 27a. The suspension without pay was effective immediately and was for an indefinite period of time.[3] J.A. 27a, 37a.

On September 1, 1992 all criminal charges lodged against Homar were dismissed for insufficient evidence after a preliminary hearing.[4] J.A. 7a. The charges were never refiled although the Pennsylvania State Police had that option.[5] J.A. 7a, 27a. Levanowitz did not lift the suspension after dismissal of all the charges, and continued with his own independent investigation. J.A. 75a, 76a.

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[3] The letter specifically indicated " . . . that any administrative action that may be taken by the University as a result of criminal charges filed against you do not have to coincide with a disposition of those charges through the legal process". J.A. 57a.

[4] Under Pennsylvania Criminal Practice, a criminal defendant is entitled to a preliminary hearing after arrest at which the Commonwealth must demonstrate a *prima facie* case. PA Rules of Criminal Procedure, 141(d); 143(a). If a *prima facie* case is not established, the defendant must be discharged. *Id.* In order to establish a *prima facie* case, the Commonwealth must merely demonstrate that a crime was committed and the accused is probably the individual who committed it. *Commonwealth v. Wojdak*, 466 A.2d 991 (Pa. 1983). The evidence must be such that "if presented at the trial in Court, *and accepted as true*, the judge would be warranted in allowing the case to go to the jury". *Id.* at 996 (emphasis in original).

On September 11, 1992, Levanowitz met with arresting Pennsylvania State Police troopers in order to obtain information pertaining to Homar. J.A. 27a, 79a. At this meeting, Levanowitz was given a copy of a page out of the Pennsylvania State Police investigative file regarding the Homar arrest entitled "Supplemental Report." The "Supplemental Report" contained statements that Homar allegedly made to the Pennsylvania State Police during an interview of Homar at the State Police barracks on August 26, 1992 after Homar's arrest. *Id.* The statements contained alleged admissions of Homar that he was aware of marijuana dealing by Crompton and another individual, and that he received marijuana from such other individual for his own use. Pet. App. 4a. Homar denied making such statements attributed to him by the state Police in the report; he specifically denied that he was aware of marijuana dealing and that he had obtained marijuana from the other individuals arrested. J.A. 51a.

Levanowitz set up a meeting with Homar on September 18, 1992. J.A. 28a. At the meeting, which was called by Levanowitz, Levanowitz explained to Homar that he had received evidence "very serious in nature" from the Pennsylvania State Police and that he wanted Homar to tell "his side of the story". Levanowitz did not disclose to Homar that he had received the "Supplemental Report" which contained admissions to wrongful conduct allegedly made by Homar. Homar was not given a copy of the "Supplemental Report" at the meeting or prior thereto, and was not otherwise advised by Levanowitz what the "very serious" evidence was. J.A. 77a.

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[5] An accused may be rearrested and prosecuted despite the dismissal of charges at a preliminary hearing. *Commonwealth v. Genovese*, 425 A.2d 367, 369, n.7 (Pa. 1981). "A finding by a committing magistrate that the Commonwealth has failed to establish a *prima facie* case is not a final determination, such as an acquittal, and only entitles the accused to his liberty for the present, leaving him subject to rearrest". *Commonwealth v. Hetherington*, 331 A.2d 205, 208 (Pa. 1975).

On September 23, 1992, Levanowitz issued a second letter to Homar advising Homar that he was being demoted from the position of Police Officer I to the position of groundskeeper, effective retroactive to August 26, 1992. The letter advised that the basis of the demotion was not Homar's arrest, but rather the "admissions made by yourself to the State Police." The letter further provided that Homar would receive back pay at the rate of pay for groundskeeper during the period of his suspension, i.e. August 26, 1992 through September 24, 1992. J.A. 82a.

After the letter demoting Homar was issued, Homar, through his union representative, contacted the President of ESU, James Gilbert, to request a meeting to discuss his demotion. J.A. 35a, 36a. The meeting occurred at the offices of President Gilbert on September 24, 1992 and was attended by Homar, his union representatives and

Levanowitz. President Gilbert issued a letter on September 24, 1992 upholding the demotion. J.A. 8a-9a.[6]

After his demotion, Homar received back pay for the period of his suspension, i.e. August 26, 1992 through September 24, 1992 at the groundskeeper rate of pay. Thereafter, on February 16, 1993, ESU paid to Homar the difference between the Groundskeeper rate and the Police Officer I rate for the period of his suspension. J.A. 53a; Pet. App. 6a, N1.

2. Homar thereafter filed a civil action in the United States District Court for the Middle District of Pennsylvania on June 7, 1993. J.A. la. The complaint named four officials at ESU, including Gilbert and Levanowitz, as Defendants and sought relief for violation of Homar's procedural due process and substantive due process rights by merit of his suspension and subsequent demotion. J.A. 3a-15a. After completion of discovery, Defendants filed a Motion for Summary Judgment which was granted by the District Court in an Opinion and Order dated March 7, 1995.

As a preliminary matter, the Court noted that there was no dispute that Homar had a protected property interest in his job. Pet. App. 58a. In weighing the competing interests involved, the District Court found that although the private interest of Homar was strong, the deprivation incidental to Homar's suspension "was only temporary and of a relatively brief duration of approximately one month." Pet. App. 60a. The Court found that because it was "undisputed" that Homar had been arrested, there was a substantial assurance that the deprivation was not baseless or unwarranted. *Id.* The District Court also found that the deprivation at issue was "de minimis" as Homar was subsequently awarded full pay and benefits for the period of suspension. Pet. App. 62a-63a.

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[6] The "Statement of James Gilbert" found in the Joint Appendix incorrectly sets forth the date of the meeting as September 4, 1992. J.A. 36a. This apparently is a printing error, as the statement filed with District Court contains the correct date of September 24, 1992.

On appeal, in a 2-1 decision, the Third Circuit reversed. It observed that this Court has made it "eminently clear" that due process entitles a party to a hearing " 'before he [or she] is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' " Pet. App. 8a (*quoting Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original)). Quoting *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545-546 (1985), the Court further noted that "[s]uch a hearing need not be elaborate, but rather 'an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.' " *Id.*

The Court of Appeals agreed that Homar's arrest gave the University a compelling justification for summarily relieving him of his duties. Pet. App. 11a. Applying the interest balancing analysis of this Court's due process decisions, however, it ultimately concluded that due process was violated because there had been no justification offered for summarily imposing a suspension without pay. *Id.*

As the Court of Appeals explained, this Court " 'has frequently recognized the severity of depriving a person of means of livelihood.' " Pet. App. 11a (*quoting Loudermill,* 470 U.S. at 543). Further, the Court of Appeals observed, while *Loudermill* had recognized that "there were some limited instances in which a strong governmental interest might warrant immediately removing a person from a position without a hearing," the Court had also advised that "in those situations," the employer "can avoid the problem by suspending with pay." *Id.* (*quoting Loudermill,* 470 U.S. at 544-45). The Court of Appeals noted that there had been no explanation offered for "why, in order to maintain public confidence in the police department and to protect public safety, it is necessary that ESU not only suspend Homar from acting as a police officer, but also deprive him of his salary." Pet. App. 14a-15a, n.5.

The Court of Appeals observed that its holding was "not only consistent with, and suggested by *Loudermill,*" but also "eminently sensible." Pet. App. 14a. The Court of Appeals recognized that "it is imperative that employers be provided with adequate flexibility to allow them to protect the public and respond to emergency situations expediently." *Id.* It held, however, that "suspension with pay addresses these important concerns while simultaneously protecting the fundamental rights of an employee to due process prior to being deprived of his or her property interest in employment and its accompanying salary." *Id.*

◆

SUMMARY OF ARGUMENT

It is unnecessary for this Court to reach the propriety of the blanket rule crafted by the Court of Appeals, as the decision below may be affirmed after application of the traditional due process factors set forth in *Mathews v. Eldridge,* 424 U.S. 319 (1976).

Notice and an opportunity to be heard prior to a deprivation of any significant property interest is the "root requirement" of due process. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 503-504 (1985) (citations omitted). Pre-deprivation notice and an opportunity to be heard have been described as the "general rule" of due process by this Court. *United States v. James Daniel Good Real Property,* 510 U.S. 43, 114 S. Ct. 492, 501 (1993).

The quantum of due process to be afforded under a particular set of circumstances is determined by applying the traditional due process factors set forth in *Mathews,* 242 U.S. at 335. A straightforward application of the *Mathews* factors to the facts of this case reveals no reason to depart from the "general rule" of due process that notice and an opportunity to be heard should be provided before the deprivation.

Mathews requires consideration of three distinct factors:

1. The private interest that will be affected by the official action;

2. The risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of any additional or substitute procedural safeguards; and

3. The government's interest including the function involved and the fiscal and administrative burdens that any additional or substitute procedural requirements would entail. *Mathews*, 424 U.S. at 335.

Homar had a strong interest in maintaining his employment and means of livelihood. The Court has frequently recognized the severity of depriving someone of their means of livelihood. *Loudermill*, 470 U.S. at 343. Because Homar's suspension was for an indefinite period of time, Homar had an even stronger interest that was affected by the official action. Because the period of suspension was open-ended, it should have been viewed for all practical intents and purposes as a termination.

Because Homar's arrest was not the process of a lengthy police investigation, a grand jury indictment or even an arrest warrant, there was "risk of an erroneous deprivation" which would have been cured by a pre-deprivation notice and opportunity to be heard. There is great utility in a pre-deprivation opportunity to be heard, as Homar would have had the opportunity to profess his innocence and request that his suspension be with pay.

This Court is in no manner bound by Petitioners' heavy reliance upon the Governor's Code of Conduct which purports to require suspension without pay after a felony arrest. That code, which merely is an executive order of the governor, has not been previously relied upon by Petitioners in these proceedings, and has no force of law. Levanowitz himself testified that he was not obliged to follow such code in determining whether to suspend Homar.

Although the governmental interest in law enforcement integrity and public safety are important, they would not be undermined by a rule recognizing that Homar should have received a *Loudermill*-type hearing before he could be suspended without pay. Nor would petitioners have suffered any significant burden by affording Homar at least the same due process as was afforded a high school student facing a ten-day suspension in *Goss v. Lopez*, 419 U.S. 565 (1975), that being notice of the charges against him, an explanation of the evidence and an opportunity to present his side of the story.

Petitioners' heavy reliance on *Barry v. Barchi*, 448 U.S. 55 (1979) and *FDIC v. Mallen*, 486 U.S. 230 (1988) to overcome the "general rule" that a pre-deprivation notice and opportunity to be heard should have been provided, is misplaced. Neither case provides a basis for an exception to the "general rule" as applied to the facts of this case.

◆

ARGUMENT

I. EXCEPT IN EXTRAORDINARY CIRCUMSTANCES, DUE PROCESS REQUIRES AN OPPORTUNITY TO BE HEARD PRIOR TO DEPRIVATION OF A PROTECTED INTEREST.

The "root requirement" of the due process clause requires that an individual be given an opportunity to be heard before he or she is deprived of any significant property interest. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543-544 (1985), *citing Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). In *Loudermill*, the Court specifically acknowledged that "the only meaningfully opportunity to invoke the discretion of the decision maker is likely to be before the termination takes effect." 470 U.S. at 543. "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

Deprivation of a property interest without a prior opportunity to be heard is the rare exception, not the rule. "This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth amendments." *Fuentes*, 407 U.S. at 82.

"That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. at 378-379 (emphasis in original).

In *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492 (1993), the Court recently reaffirmed the "general rule" that individuals must receive notice and an opportunity to be heard before the government deprives them of property. "We tolerate some exceptions to the general rule requiring the predeprivation notice and hearing, but only in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' " 114 S. Ct. at 501.

II. RESPONDENT SHOULD HAVE BEEN AFFORDED A PRE-DEPRIVATION OPPORTUNITY TO BE HEARD UNDER TRADITIONAL DUE PROCESS ANALYSIS.

In ascertaining the due process to be afforded a tenured public employee whom the employer desires to suspend *without pay,* the Court of Appeals for the Third Circuit below crafted a rule requiring the governmental employer to provide the employee with "some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard". Pet. App. 14a. The Court further held that in the event the governmental employer desired to suspend the employee without providing a pre-deprivation opportunity to be heard, then such suspension must be with pay. *Id.*

Although respondent believes the holding of the Court of Appeals to be essentially correct, this Court need not reach the issue of whether the Court below properly fashioned what Petitioners characterize as a "blanket rule." It is submitted that the holding of the court of appeals below may be affirmed after straightforward application of the factors set forth in *Mathews v. Eldridge,* 424 U.S. 319, 334 (1976), to the facts at bar. Moreover, as argued at length by *amicus curiae* National Treasury Employees Union, this Court should confirm that, as a general rule, public employees are entitled to a limited pre-deprivation hearing before they may be suspended without pay.

Respondent agrees with Petitioners that in order to ascertain the quantum of due process that must be afforded in a given situation, the factors set forth in

Mathews should be applied. See Pet. Br. 12-13. The requisite due process required under a particular set of facts and circumstances is determined by a balancing of the governmental and private interests that are affected. *Mathews v. Eldridge,* 424 U.S. at 334; *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 434 (1982).

Identification of the specific dictates of due process generally requires consideration of three distinct factors: (1) the private interests that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any or additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Mathews v. Eldridge,* 424 U.S. at 335 (citation omitted).

A. Homar Had A Strong Private Interest In Maintaining His Tenured Position And Wages.

Homar had a strong private interest in maintaining his continued employment and means of livelihood. An interest "in continued employment is without doubt an important interest that ought not to be interrupted without substantial justification". *FDIC v. Mallen,* 486 U.S. 230, 243 (1988).

> The significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. While a fired worker may find employment elsewhere,

> doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.

Loudermill, 470 U.S. at 543. (citations omitted)

In the case at bar, Homar's suspension without pay was open-ended. The letter notifying Homar of his summary suspension specifically indicated that any "administrative action" to be taken by the University did not have to coincide with the disposition of the criminal charges against Homar. J.A. 82a. The period of the suspension could, therefore, continue indefinitely.[7]

Where an employee is being suspended for an indefinite period of time, it is submitted that the employee has an even stronger private interest that will be affected by the official action.

Petitioners denigrate Homar's property loss by describing it as mere "money" which is "easily replaceable". Pet. Br. 19. It is respectfully submitted that loss of income from one's employment is not mere money, but rather goes directly to the ability to support one's self and provide for one's basic needs. The Court has previously recognized that loss of even part of a wage earner's salary "often means his family will go without the essentials." *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 342 n.9 (1975).

The loss of a wage earner's paycheck is certainly at least as important as the loss of an income stream from real property, which the Court recently held to be a significant private interest in *United States v. James Daniel Good Real Property, supra,* wherein the Court stated:

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[7] Homar's suspension, in fact, continued 23 days beyond September 1, 1992, the date that all criminal charges filed against him were dismissed.

> The government makes much of the fact that Good was renting his home to tenants, and contends that the tangible effect of the seizure was limited to taking the $900 a month he was due in rent. But even if this were the only deprivation at issue, it would not render the loss insignificant or unworthy of due process protection. The rent represents a significant portion of the exploitable economic value of Good's home. It cannot be classified as *de minimis* for purposes of procedural due process. In sum, the private interests at stake in the seizure of real property weigh heavily in the *Mathews* balance.

114 S. Ct. at 501.

The loss of salary for an indefinite period of time is also at least as important as a fixed ten-day suspension from high school, which the Court specifically found "not de minimis in our view." *Goss v. Lopez,* 419 U.S. 565, 576 (1975). "The Court's view has been that as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the due process clause." *Id.* (citations omitted).

Where the suspension is for an indefinite period of time, as the case here, it is respectfully submitted that the suspension must be viewed or all practical intents and purposes as a termination. A wage earner who is suspended for an open-ended period of time does not have the luxury of sitting idle in the hopeful expectation of the employer lifting the suspension at some indefinite time in the future. There is no guarantee of the suspension ever being lifted. It must be expected that the suspended wage earner will be confronted with an immediate lack of funds, and a need to expeditiously replace those funds with other employment during the tenure of the open-ended period of suspension. Therefore, in addition to the income loss itself, the wage earner is confronted with finding employment elsewhere under the stigma of the suspension and being "burdened by the questionable circumstances under which he left his previous job." *Loudermill*, 470 U.S. at 543.

Based on the foregoing, it is submitted that, under these circumstances, there is a strong private interest to be given great weight in a *Mathews* due process analysis.

B. There Was A Substantial Risk Of An Erroneous Deprivation Of Homar's Property Interest That "Additional Or Substitute Procedural Safeguards" May Have Prevented.

Petitioners characterize the second factor to be examined in a due process analysis as "the value of additional or substitute procedural safeguards." Pet. Br. 20. This is an oversimplification of the second *Mathews* factor. The second factor to be analyzed in due process balancing analysis is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews v. Eldridge*, 424 U.S. at 335. In the case at bar, it is submitted that there was a substantial risk of erroneous deprivation.

1. Homar was arrested incident to a search of a friend's home that he happened to be visiting at the time the search warrant was executed. The arrest of Homar was not the process of a lengthy police investigation, grand jury indictment, or even an arrest warrant; rather, it spontaneously occurred because he was at the proverbial "wrong place at the wrong time".

Because Homar's arrest was incident to the execution of a search warrant of another's premises, there is no adequate assurance that the deprivation was not erroneous. The circumstances here stand in marked contrast to, for example, those present in *Mallen*, where an independent body – a grand jury – determined that there was probable cause to believe that a crime had been committed. *Mallen*, 486 U.S. at 244. As in *United States v. James Daniel Good Real Property*, there is an "unacceptable risk of error" that argues strongly in favor of some opportunity to be heard prior to the deprivation. 114 S. Ct. at 501.

Petitioners argue that "little useful purpose" would be served by any pre-deprivation opportunity to be heard, as the only issue to be determined by Levanowitz was whether or not Homar had been arrested and charged with a felony. Pet. Br. 20-21. However, it is submitted that there would be great purpose and utility in giving Homar the benefit of informing Levanowitz of the circumstances under which he was arrested. Had a predeprivation opportunity to be heard have been provided, Homar could have advised Levanowitz that he was arrested as a result of visiting the Crompton house that morning, which he had only entered minutes prior to the execution of the search warrant by the Pennsylvania State

Police. J.A. 50a-51a. He could have advised Levanowitz that he was on his way to do yard work at his mother's home, which was a block down the road from the Crompton house, on the morning of his arrest. *Id.* He could have personally professed his innocence and given Levanowitz some basis upon which to make his decision, other than information obtained solely from the arresting officers.

Additionally, "[e]ven where the facts are clear, the appropriateness or necessity of a discharge may not be . . . " *Loudermill,* 470 U.S. at 543. In addition to professing his innocence and simply being at the wrong place at the wrong time, Homar could have also requested Levanowitz to suspend him with pay at a pre-deprivation opportunity to be heard, or request that his duties be adjusted as a result of his arrest. In sum, a very useful purpose would have been served by allowing Homar to state his case before Levanowitz prior to Levanowitz's decision with respect to Homar's suspension.

2. Petitioners argue that Levanowitz had no choice but to suspend Homar without pay because Levanowitz was allegedly bound by applicable administrative regulation that mandated suspension without pay in cases where an employee had been formally charged with a felony. Pet. Br. 20-21. The regulations at issue are found in what is commonly referred to as "The Governor's Code of Conduct" codified at 4 Pa. Code §7.172, 7.173 (reproduced in part at Pet. Br. 3).

As a preliminary matter, Petitioners have come late to the argument that the action of Levanowitz in suspending Homar without pay was mandated by the above referenced provisions of the Governor's Code of Conduct. The above regulations have not been raised or even referred to previously by Petitioners in Petitioners' Answer to the Complaint (J.A. 17a-23a); Petitioners' Motion, Statement of Material Facts, or Brief filed in Support of Petitioners' Motion for Summary Judgment filed in the District Court; Petitioners' Brief in the Court of Appeals below, or the Petition for Certiorari. It is therefore submitted that Petitioners' new-found argument that Levanowitz was bound by the above referenced regulations are subject to the doctrine of waiver and should not even be considered by this Court.[8]

Additionally, under Pennsylvania law, the Governor's Code of Conduct does not have the force of law. The Governor's Code of Conduct is not a statute, but rather is merely an executive order issued by the governor. *State Correctional Institution at Greaterford v. Brumfield*, 594 A.2d, 852, 856 (Pa. Commw. Ct. 1991). "In no event . . . may any executive order be contrary to any constitutional or statutory provision, nor may it reverse, countermand, interfere with, or be contrary to any final decision or order of any court. The Governor's power is to execute the laws and not to create or interpret them." *Aiello v. Department of Environmental Resources*, 551 A.2d 664, 665

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[8] See *Auer v. Robbins*, 65 U.S.L.W. 4136, 4139 (February 19, 1997) citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (refusing to consider arguments not adequately preserved below).

(Pa. Commw. Ct. 1988), *citing Shapp v. Butera,* 348 A.2d 910, 914 (Pa. Commw. Ct. 1975).

An order of the governor which communicates requested or suggested directions for the execution of the duties of the executive branch of government are mere directives which do not confer a legally enforceable right. *Sever v. Commonwealth of Pennsylvania Department of Environmental Resources,* 514 A.2d 656, 659 (Pa. Commw. Ct. 1986). A directive which implements an executive order has no force of law. *Id.* Therefore, Petitioners' argument that "state law *required* that any employee be suspended without pay as soon as practicable" after being charged with a felony (Pet. Br. 21) is without merit.

Levanowitz himself indicated that he did not believe the Governor's Code of Conduct to clearly require him to suspend Homar. When asked if he was "obliged" to follow the Governor's Code of Conduct, Levanowitz stated "I'm not sure that I would choose the word 'obliged' "; rather, he testified that "I did refer to [the Governor's Code of Conduct] and let it guide my actions somewhat in this case." J.A. 67a. Levanowitz was also careful to point out that the Governor's Code of Conduct was not a "University policy," but rather, a "Commonwealth policy" which was not part of the University's policy per se with respect to labor relations. J.A. 65a-66a. With respect to his decision to suspend Homar, Levanowitz testified that he relied upon his previous experience, labor relations journals which he had in his possession, the Collective Bargaining Agreement and consultations with "labor relations people" in the "Chancellor's office." J.A. 65a-66a; Court of Appeals J.A. at 137.

Additionally, with respect to the Governor's Code of Conduct, it should be noted that Levanowitz and ESU did not abide by the very provisions that they now bring before the Court as a basis for their actions. Specifically, after all charges against Homar were dismissed on September 1, 1996, Levanowitz did not lift the suspension which Petitioners now argue was necessitated by the Governor's Code of Conduct – but rather continued with the same pending his own independent investigation. The regulation at issue clearly provides that a suspension is to be imposed on the basis of a felony arrest. If Levanowitz was basing his actions on the Governor's Code of Conduct and was bound by the same, then why was the suspension not lifted upon dismissal of all charges against Homar?

Finally, in any event, " 'the minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.' " *Loudermill*, 470 U.S. at 541, *citing Vitek v. Jones*, 445 U.S. 480, 491 (1980).

The Petitioners' eleventh hour reliance on the Governor's Code of Conduct should be rejected by this Court.

3. The second *Mathews* factor also requires an analysis of the probable value of any additional or substitute procedural safeguards. 424 U.S. at 335. Of course, with respect to Homar's suspension, no procedural safeguard was in place whatsoever. Rather, the suspension by Levanowitz was nearly automatic, after Levanowitz learned of Homar's arrest.

Notice to Homar and an opportunity to be heard would have afforded Homar the chance to plead his innocence of the charges to Levanowitz and argue against his suspension. "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented." *Fuentes v. Shevin,* 407 U.S. 67, 81 (1972).

Even if one believes that Homar would have had little success in convincing Levanowitz not to suspend him, such an unfavorable outcome for the employee does not mitigate against the opportunity to be heard. The right to a hearing does not depend on a demonstration of certain success. *Loudermill,* 470 U.S. at 544, citing *Carey v. Piphus,* 435 U.S. 247 (1978). "The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. 'To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case, due process of law would have led to the same result because he had no adequate defense upon the merits' ". *Fuentes,* 407 U.S. at 87 citing *Coe v. Armour Fertilizer Works,* 237 U.S. 413, 424 (1915).

C. No Significant Fiscal Or Administrative Burden Would Be Imposed By Requiring Pre-Deprivation Notice And An Opportunity To Be Heard.

1. Homar agrees with the Court of Appeals that the governmental interest in maintaining public confidence in the ESU police force is significant. Pet. App. 11a.

However, notwithstanding that strong governmental interest, it is submitted that an additional requirement of a hearing before suspension without pay would impose to such a negligible degree on the governmental interest that, considering the analysis of all factors under *Mathews*, a pre-suspension opportunity to be heard is appropriate.

Here, a pre-deprivation opportunity is especially critical because the suspension was indefinite. The "potential length" as well as the severity of the deprivation must be examined in determining whether advance procedural safeguards are appropriate. *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 19 (1978). Because the length of the suspension was open ended, Homar theoretically may not have had the opportunity to be heard for weeks, months, or even years after his initial suspension without pay. Under these circumstances, it is submitted that some procedural safeguard was appropriate prior to the deprivation.

In the case at bar, ESU would have suffered no detriment by permitting Homar the opportunity to be heard prior to his suspension. ESU could have expeditiously provided Homar with such an opportunity at virtually no cost.

Homar is not suggesting that he would be entitled to a full evidentiary hearing prior to his suspension. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). However, Homar believes he was entitled to notice of his suspension and an opportunity to be heard. It is submitted that Homar should be entitled to at least as much pre-deprivation due process as is a high school student facing a ten-day suspension, that is, oral or written notice of the charges against him, and if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

Assuming arguendo that the significant State interest in law enforcement strongly argued in favor of an immediate suspension, there still remains the issue of whether such suspension should be with or without pay. The additional procedural safeguard of a pre-deprivation hearing would have given Homar the opportunity to request that his suspension be with pay. This is a unique aspect of an employment case which is not present in many of the due process cases relied upon by Petitioners and Petitioners' *amici* for the proposition that in some limited, emergency situations, summary action without a pre-deprivation opportunity to be heard is permissible. See *Hodel v. Virginia Surface Min. & Reclam. Assn.*, 552 U.S. 264 (1981) (order to cease strip mining); *Barry v. Barchi*, 443 U.S. 55 (1979) (suspension of horse training license); *Mackey v. Montrym*, 443 U.S. 1 (1979) (suspension of driver's license); *Ewing v. Mytinger and Casselbarry, Inc.*, 339 U.S. 594 (1950) (seizure of misbranded food supplement).

Despite the argument of Petitioners and their *amici* to the contrary, the cost of paying an employee's wages for the brief period of suspension will not deplete government coffers or erode the public fisc. Because the employee is entitled, in any event, to a prompt post-suspension opportunity to be heard, the period of the suspension should be short and the amount of pay during the suspension minimal. See *Barry v. Barchi*, 443 U.S. at 66 (1979). Several days pay during a period of a suspension pending a *Loudermill* hearing is certainly not analogous to a "paid vacation," as is argued by Petitioners. Pet. Br. 22.

2. Petitioners and their *amici* strongly rely upon *Barry v. Barchi* and *FDIC v. Mallen*. It is submitted that neither of these cases requires a departure from the general rule that notice and opportunity to be heard should be provided prior to a deprivation.

In *Barchi*, a harness race horse trainer was suspended for a period of fifteen days by the New York State Racing and Wagering Board after a post-race urinalysis revealed a drug in Barchi's horse. 443 U.S. at 372. New York law presumes that such drugs were either administered by the trainer or resulted from his negligence in failing to adequately protect against such occurrence. *Id.* Barchi filed suit alleging, *inter alia*, that he was entitled to a full evidentiary hearing prior to the effectuation of his suspension. 443 U.S. at 64.

The Court held that New York State was entitled to impose an interim suspension pending a prompt judicial or administrative hearing. The Court held that the positive drug test "would appear sufficiently reliable to satisfy constitutional requirements" and establish the probable cause needed to justify a suspension pending a post-deprivation hearing. *Id.* However, the Court also noted that "although Barchi was not given a formal hearing prior to the suspension of his license, he was immediately notified of the alleged drugging 16 days prior to the imposition of the suspension, and he was given more than one opportunity to present his side of the story to the State's investigators. In fact, he stated his position in the course of taking two lie detector examinations." *Id.* at 65.

The Court then stated that "[e]ven if the state's pre-suspension procedures, then, were not adequate finally to resolve the issues fairly and accurately, they suffice for the purpose of probable cause and interim suspension." 443 U.S. at 66. *Barchi* was decided prior to *Loudermill,* and is cited by *Loudermill* as a case in which termination procedures were found to be constitutional based in part upon "the existence of some pre-termination opportunity to respond". 470 U.S. at 542.

Based upon the foregoing, *Barry v. Barchi* is not a case where "the Court approved pre-hearing suspensions," as argued by Petitioner. Pet. Br. 11. Rather, *Barchi* addresses the question of what quantum of due process is to be afforded after an application of the traditional *Mathews* balancing factors. Although *Barchi* maintained that he was entitled to a full evidentiary hearing, the Court found that Barchi was afforded "pre-suspension procedures," which the Court found constitutionally adequate under the circumstances. 443 U.S. 376. This interpretation of *Barchi* is validated by the manner in which *Barchi* is cited by this Court in *Loudermill,* 470 U.S. at 542.

In *FDIC v. Mallen,* the president of an Illinois bank was suspended after he was indicted for conspiracy to commit mail fraud. Under the Federal Deposit Insurance

Act, the FDIC was given authority by Congress to suspend and indict a bank officer without providing a predeprivation opportunity to be heard. 486 U.S. at 233.

Four days after his suspension, the bank president requested an administrative hearing as is provided for in the Act. 12 U.S.C. §1818(g). Although the bank president desired to offer oral testimony at the hearing, the FDIC took the position that oral testimony would not be necessary. Prior to the scheduled hearing, the bank president commenced suit in federal court. The District Court held that the post-suspension process violated due process because it did not provide for a prompt disposition and also because it failed to provide for a hearing at which oral evidence could be presented. 486 U.S. at 277. As the Court stated, "[i]t is the adequacy of the post-suspension procedure authorized by [12 U.S.C. § 1818(g)(3)] that is the issue in this appeal". 486 U.S. at 235.

After acknowledging that the bank president clearly had a property right protected by the Fifth Amendment Due Process clause, the Court specifically noted that "[a]ppellee does not contend that he was entitled to an opportunity to be heard prior to the order of suspension." *Id.* at 240. The Court, in *dicta,* then briefly discussed the narrow exception to the general rule that a notice and opportunity to be heard must be provided before a deprivation. *Id.* at 240-241. The Court discussed "postponing the opportunity to be heard" in the specific context of whether it was appropriate to provide the suspended bank president with "a separate pre-suspension *hearing.*" *Id.* (emphasis added) In *dicta,* the Court found that the suspension "was not baseless" because a Grand Jury had independently determined that there was probable cause to believe that the bank president had committed a felony, and that Congress had made findings that a prompt suspension is important to the integrity of banking institutions. *Id.* at 240.

Preliminarily, as the Court of Appeals notes, it is unclear in *Mallen* if the suspension was with or without pay. Pet. App. 12a. The legislation at issue does not specifically indicate whether the suspension is to be with or without pay. 12 U.S.C. § 1818(g)(3), as amended.

This case is distinguishable from *Mallen* for several reasons. First, and perhaps most importantly, the discussion found in *Mallen*, in *dicta*, appears to relate to whether a full evidentiary "hearing" should be afforded prior to the suspension. *Mallen*, in *dicta*, refers several times to *Barry v. Barchi*, and the conclusion in *Barchi* that the interest in the State in preserving the integrity of the sport of horse racing was "deemed sufficiently important . . . to justify a brief period of suspension prior to affording the suspended trainer a *hearing*". 443 U.S. at 64-65 (emphasis added). As discussed above, some pre-suspension due process was afforded in *Barchi*. However, the primary issue in *Barchi* was whether the trainer was entitled to an evidentiary hearing prior to the suspension. This appears to be the same issue discussed in the *Mallen dicta*, as opposed to analysis of whether some less elaborate form of notice and an opportunity to be heard is appropriate.

Secondly, the indicia of "probable cause to believe that appellee had committed a felony" (486 U.S. at 278) is much less compelling in the present case. In *Mallen*, the bank president was the subject of a grand jury indictment. Although a grand jury is an ex-parte proceeding, it nonetheless provides some protection against improper arrest and criminal prosecution that a spontaneous arrest incident to the execution of a search warrant does not provide.

Thirdly, determining the nature of the governmental interest, the Court considered specific Congressional findings and legislation in determining "that a prompt suspension is important to the integrity of our banking institutions." 486 U.S. at 241. In the case at bar, there are no similar legislative findings or statutes which the Court could consider in assessing the nature of the governmental interest involved.

For the above reasons, neither *Barchi* nor *Mallen* should preclude a finding that some pre-deprivation opportunity and a notice to be heard should have been afforded to Homar prior to his suspension without pay.

◆

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 11 1997
CLERK

No. 96-651

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAMES E. GILBERT, PRESIDENT, EAST STROUDSBURG
UNIVERSITY, ET AL., PETITIONERS

v.

RICHARD J. HOMAR

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a public employer must always provide a hearing before suspending an employee without pay if the suspension is followed by a hearing within a reasonable time.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-651

JAMES E. GILBERT, PRESIDENT, EAST STROUDSBURG
UNIVERSITY, ET AL., PETITIONERS

v.

RICHARD J. HOMAR

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*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

With almost two million workers, the federal government is the nation's largest employer. The Office of Personnel Management (OPM) serves as the "central personnel office of the executive branch" and is responsible for government-wide oversight of the federal civil service system. *National Treasury Employees Union* v. *United States Merit Sys. Protection Bd.*, 743 F.2d 895, 899 (D.C. Cir. 1984); 5 U.S.C. 1101-1104. Pursuant to its statutory authority, OPM has promulgated a detailed and comprehensive set of regulations governing federal personnel management, including the discipline of employees. 5 C.F.R. Pt. 752. In this case, the court of appeals cited *Cleveland*

Board of Education v. *Loudermill*, 470 U.S. 532 (1985), to state a blanket rule "that a governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard." Pet. App. 14a. The procedural safeguards currently provided in routine federal disciplinary actions generally comport with the court's rule. Nevertheless, the United States has an interest in assuring that *Loudermill*, which involved a termination, is not improperly extended to suspension cases in a manner that "intrude[s] to an unwarranted extent" on the federal government's needed flexibility to address employee misconduct in situations not adequately contemplated by the court of appeals. See *Loudermill*, 470 U.S. at 546.

STATEMENT

This case concerns what process is due before a public employee may be suspended without pay for misconduct.

1. Personnel management in the federal sector is governed by the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified in various sections of 5 U.S.C.). The CSRA replaced the Civil Service Commission with two agencies, OPM (5 U.S.C. 1101-1105) and the Merit Systems Protection Board (MSPB) (5 U.S.C. 1201-1206); it codified merit systems principles and prohibited personnel practices (5 U.S.C. 2301, 2302); and it established procedures for adverse personnel actions (5 U.S.C. 4303, 7501-7543).

In cases involving misconduct, Chapter 75 of the CSRA establishes the standards and procedures governing removals, demotions, suspensions, and other adverse actions initiated to "promote the efficiency of the service." 5 U.S.C. 7503(a), 7513(a). In addition to authorizing the circumstances and manner in which the federal government handles employee misconduct, the CSRA and implementing regulations provide federal employees with specific substantive rights in such proceedings. See 5 U.S.C. 7503, 7513; 5 C.F.R. Pt. 752. The substantive rights and procedural protections to which any particular employee is entitled depend upon the employee's classification within the three groups of Senior Executive Service, competitive service, and excepted service.[1] In general, the CSRA provides more extensive rights and protections to tenured or nonprobationary employees than it provides to probationary employees. Compare 5 U.S.C. 7501, 7503, with 5 U.S.C. 7511, 7513, 7543.[2]

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[1] The "Senior Executive Service" covers employees in high-level agency positions for whom appointment by the President and Senate confirmation is not required. 5 U.S.C. 3132(a)(2). "Competitive service" employees are all other employees for whom nomination by the President and Senate confirmation are not required, and who are not specifically excepted from the competitive service. 5 U.S.C. 2102. "Excepted service" employees hold civil service positions that are not in the competitive service or the Senior Executive Service. 5 U.S.C. 2103. Before an appointment in the competitive service becomes final, the employee must serve a one-year probationary or trial period. 5 U.S.C. 3321; 5 C.F.R. 315.801(a).

[2] With respect to an adverse action involving a suspension for 14 days or less, the CSRA excludes individuals in the excepted service and probationers from the definition of "employee." See 5 U.S.C. 7501(1). The CSRA includes individuals in the excepted service in the definition of "employee" with respect to the rights and procedures available in the case of an adverse action such as removal, suspension for more than 14

Pursuant to the CSRA and OPM regulations (5 C.F.R. Pt. 752), a nonprobationary employee in the competitive service may be suspended[3] for 14 days or less "for such cause as will promote the efficiency of the service." 5 U.S.C. 7503(a); 5 C.F.R. 752.201-752.203.[4] When such action is proposed, the employee is entitled to the following procedural rights before a suspension takes effect: (1) advance written notice of the specific reasons for the proposed action; (2) a reasonable time to answer orally and in writing; (3) representation by an attorney or other representative; and (4) a written decision and the specific reasons therefor at the earliest practicable date." 5 U.S.C 7503(b). OPM regulations deem a "reasonable time to answer" the charges as "not less than 24 hours." 5 C.F.R. 752.203(c).

When the proposed adverse action involves removal, suspension for more than 14 days, reduction in grade or pay or furlough for 30 days or less, an employee has greater procedural rights under the statute—particularly following suspension. 5 U.S.C. 7512, 7513. An

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days, or demotion. See 5 U.S.C. 7511(a)(1)(C). Even for those more severe actions, however, the CSRA continues to exclude probationers from the statutory definition of "employee." Within each of the three main employment classifications, the CSRA accords special treatment to "preference eligible" employees (*i.e.*, veterans and sometimes the spouse and mother of a veteran). 5 U.S.C. 2108(3).

[3] " '[S]uspension' means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay." 5 U.S.C. 7501(2).

[4] The substantive and procedural rights of administrative law judges (ALJs) and employees in the Senior Executive Service facing disciplinary action are addressed elsewhere in Chapter 75. See 5 U.S.C. 7521(a) (ALJs), 7542, 7543 (Senior Executives).

employee facing such an action is entitled to at least 30 days' advance written notice (unless there is reasonable cause to believe a criminal offense has been committed), reasonable time in which to answer, representation, and a written decision at the earliest practicable date—all before suspension occurs. 5 U.S.C. 7513(b); 5 C.F.R. 752.404(d)(1).[5] The requirement of 30 days' advance written notice does not apply when such action is deemed by the agency head to be in the interests of national security. See 5 U.S.C. 7532. A permanent, nonprobationary employee who is a United States citizen and has been suspended pursuant to Section 7532(a) and against whom removal is proposed is entitled to invoke post-suspension procedures, such as hearing and review by the head of the agency. 5 U.S.C. 7532(c).

2. Respondent Richard Homar was arrested during a drug raid at a friend's home on August 26, 1992, and was charged in a criminal complaint that same day with possession of marijuana, possession with intent to deliver, and criminal conspiracy. At the time, Homar was employed as a police officer at East Stroudsburg University (ESU).[6] The Pennsylvania state police notified Homar's supervisor of the arrest and charges against him. Petitioner Gerald Levanowitz, ESU's Director of Human Resources, decided immediately to suspend Homar without pay.

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[5] The employing agency may also provide by regulation for a hearing in lieu of or in addition to the opportunity to answer provided in 5 U.S.C. 7513(b)(2). See 5 U.S.C. 7513(c).

[6] Respondent alleges in his complaint, and petitioners do not dispute, that he was fully tenured in his position as an ESU police officer, having completed a six-month probationary period in accordance with the collective bargaining agreement between respondent's union and ESU. C.A. App. 10-11, 20.

Homar, however, chose not to report for work that day, and the next day, August 27, he telephoned a university official and asked whether he had been suspended. Pet. App. 50a. The official confirmed that he had been, and advised that Homar would receive a letter that day stating that he had been suspended without pay pending further investigation and the disposition of the criminal charges. The letter informed Homar that any administrative action taken would not necessarily coincide with disposition of the criminal charges against him. *Ibid.* All criminal charges against Homar were dismissed on September 1, 1992. *Id.* at 52a.

The university proceeded with its own investigation. On September 11, 1992, Levanowitz met with the state trooper who had signed the criminal complaint against Homar. The trooper provided Levanowitz with a copy of a page from the state police's "Supplemental Report" of the incident. The report stated that Homar had allegedly admitted knowledge of his friend's drug dealing and that he had received marijuana for his own use while employed as an ESU police officer. Levanowitz telephoned Homar, and arranged to meet with him on September 18. Levanowitz advised Homar that the meeting would be an administrative hearing at which he would be entitled to union representation. Pet. App. 52a-54a.

At the meeting on September 18, 1992, Levanowitz told Homar that the state police had given him some evidence "very serious in nature." He offered Homar the opportunity to present his side of the story. He did not, however, inform Homar of the Supplemental Report containing his alleged confession. Pet. App. 54a.

By letter dated September 23, 1992, Levanowitz notified Homar that he was being demoted from the position of police officer to the position of groundskeeper "effective retroactive to August 26, 1992." Pet. App. 54a-55a. The letter also advised Homar that he would "be given back pay to that date at the rate of pay for a Groundskeeper." *Id.* at 55a.[7] The letter stated that the adverse action was being taken "*as a result of admissions made by yourself to the Pennsylvania State Police on August 26, 1992 that you maintained associations with individuals whom you knew were dealing in large quantities of marijuana and that you obtained marijuana from one of those individuals for your own use.*" *Ibid.* Although the letter purported to make the demotion retroactive, in fact it did not take effect until after September 24. "Homar consequently does not claim that he lost pay or benefits during the period of his suspension." *Id.* at 56a.

After receiving the letter and the Supplemental Report, Homar and his union representative met with ESU's president, petitioner Gilbert, who provided Homar an opportunity to respond to the charges and to Levanowitz's decision. Gilbert then sustained the suspension. Pet. App. 6a.

3. When union grievance procedures failed to achieve a satisfactory outcome for Homar, he filed a complaint in federal district court pursuant to 42 U.S.C. 1983 against the university officials alleging violations of his constitutional rights. In particular,

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[7] ESU later paid respondent additional backpay for the difference between a police officer's salary and that of a groundskeeper after intervention from respondent's employee union. Pet. App. 55a-56a.

Homar asserted that petitioners' failure to give him a hearing before suspending him without pay violated his right to procedural due process.[8]

The district court granted summary judgment in favor of petitioners, holding that Homar received adequate procedural due process. Although both sides had relied on *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985), the court distinguished that case on the ground that Homar had not been terminated; rather, he had been suspended and then demoted. Pet. App. 59a. The court expressed uncertainty over whether due process protections extend to employment discipline short of termination; since neither party had addressed the issue, however, the court presumed that Homar had a protected property interest in his position as an ESU police officer. *Ibid.* Citing *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982), the court weighed the competing interests involved and concluded that, while the private interest was strong, "the deprivation incident to a suspension was only temporary and of a relatively brief duration (approximately one month)." Pet. App. 60a. Given the undisputed fact of Homar's arrest on drug-related charges, the district court opined that the risk of governmental error was slim and that the governmental interest in preserving public confidence in law enforcement was compelling. *Ibid.* After noting that Homar was eventually awarded full backpay and benefits for the period of the suspension, the court concluded that, "[a]t most, he was denied the use of his salary for a very brief period of time" and that "[t]o recognize a cause of action for denial of due process under these circumstances would clearly elevate form over substance." *Id.* at 62a. Accordingly, the court granted summary judgement for the defendant "because the alleged deprivation was *de minimus.*" *Id.* at 63a.

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[8] Respondent also averred that the hearing preceding his demotion was procedurally inadequate; that his suspension and demotion violated his substantive due process rights; and that he was also deprived of protected liberty interests. Because petitioner did not raise those issues in the petition for a writ of certiorari, the court of appeals' disposition of those issues is not before this Court.

4. In a split decision, the court of appeals reversed. The court noted that no dispute existed over whether Homar had a protected property interest in his employment, Pet. App. 9a, and it agreed with the district court that a compelling governmental interest supported ESU's decision to suspend Homar immediately and without a hearing pending further investigation, *id.* at 11a. Nonetheless, the court concluded that "Homar's due process rights were violated because he was suspended *without pay.*" *Ibid.* (emphasis in original). In the court's view, "*Loudermill* strongly suggests that suspension without pay must be preceded by notice and an opportunity to be heard in *all instances.*" *Ibid.* (emphasis added). The court therefore declared: "Today we clearly enunciate that a governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard." *Id.* at 14a. Such a rule, the court opined, "is not only consistent with, and suggested by, *Loudermill*, but it is also eminently sensible" in light of the balancing of governmental and employee interests at stake. *Ibid.*[9]

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[9] The court acknowledged that the other courts of appeals "which have examined this language in *Loudermill* have dis-

The court of appeals disagreed with the district court's conclusion that, because Homar later received full pay and benefits for the period of his suspension, he was essentially suspended "with pay." Relying on *Bradley* v. *Pittsburgh Board of Education*, 913 F.2d 1064, 1077 (3d Cir. 1990), the court stated that the subsequent awarding of backpay does not remedy a due process violation. Pet. App. 15a-16a. Finally, the court rejected the district court's conclusion that Homar's suspension without pay could be viewed as "*de minimis*," because "[f]or a period of approximately one month, Homar's very livelihood was threatened because he received no salary." *Id.* at 16a. Accordingly, the court held that the district court erred in granting summary judgment in favor of petitioners on this issue.

Judge Alito dissented from the court's holding that a pre-suspension hearing was required. Pet. App. 29a-36a. Relying principally on *FDIC* v. *Mallen*, 486 U.S. 230, 240-241 (1988), Judge Alito reasoned that the need for prompt action in this case justified postponing the opportunity to be heard until after the suspension.

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agreed with regard to its precise mandate." Pet. App. 11a. The court contrasted *Everett* v. *Napper*, 833 F.2d 1507, 1512 (11th Cir. 1987) (pre-suspension hearing required under *Loudermill* where employee was not paid during suspension), with *Engdahl* v. *Department of Navy*, 900 F.2d 1572, 1578 (Fed. Cir. 1990) ("[W]e cannot read *Loudermill* as holding that the government *must* suspend * * * *with pay*."). Pet. App. 11a-12a. The court below also noted that other circuits have on occasion allowed suspension without pay to stand in the absence of a pre-deprivation hearing, but without explicitly addressing *Loudermill*. *Id.* at 12a (citing *Jones* v. *City of Gary*, 57 F.3d 1435, 1436 (7th Cir. 1995); *Ambus* v. *Granite Bd. of Educ.*, 975 F.2d 1555, 1558, 1562 (1992), aff'd as modified on rehearing, 995 F.2d 992 (10th Cir. 1993) (en banc)).

Pet. App. 29a. Judge Alito found no requirement in the case law that a public employee must pay its suspended employees or provide them with a pre-deprivation hearing. *Id.* at 30a.

SUMMARY OF ARGUMENT

I. The court of appeals erred by ruling that a hearing is always required before a public employer may suspend an employee without pay. This Court has consistently held that procedural due process is a flexible concept that requires a balancing of the private and public interests that are affected. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976). Such flexibility is needed because the process due in any particular circumstance will depend upon the nature of the deprivation sustained and the public interests supporting the process afforded.

A per se rule that would apply in all cases involving suspension without pay is also inconsistent with the reasoning of *FDIC* v. *Mallen*, 486 U.S. 230 (1988), and *Barry* v. *Barchi*, 443 U.S. 55 (1979), which upheld prehearing suspensions so long as adequate hearings followed promptly thereafter. In distinguishing those cases, the court below believed that language in *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985), "strongly suggests" that "suspension without pay must be preceded by notice and an opportunity to be heard in all instances." Pet. App. 11a. *Loudermill*, however, does not support a per se rule that a hearing must always be held before an employee is suspended without pay. Nor do this Court's decisions support the position that the indefiniteness of a property loss will compel a pre-deprivation hearing. See, *e.g.*, *Mallen*, 486 U.S. at 243.

Adoption of a per se rule would unnecessarily cast doubt on the constitutionality of certain aspects of the federal employee management scheme. Under the federal system, employees who have not completed one year of service may be suspended and/or terminated without prior notice and without any type of hearing. Similarly, employees suspected of threatening national security may be summarily suspended without pay, with the opportunity only for a post-suspension hearing.

II. Because the court below relied on a bright-line rule, it did not engage in the appropriate balancing of interests required by *Mathews* and its progeny. Accordingly, the case should be remanded for a determination of the precise nature of the deprivation sustained by Homar, the interests asserted by petitioners in suspending Homar without pay, and a balancing of the public and private interests to determine whether the post-suspension hearing procedures provided by petitioners comported with constitutional due process standards.

ARGUMENT

I. THE COURT BELOW ERRED IN MANDATING PRE-DEPRIVATION HEARINGS IN ALL CASES IN WHICH A PUBLIC EMPLOYEE IS SUSPENDED WITHOUT PAY

The court of appeals concluded that petitioners were fully justified in suspending Homar immediately and without a hearing after learning of his arrest on drug charges. Pet. App. 11a. But the court held that Homar's procedural due process rights were violated by petitioners' failure to give him an adequate opportunity to be heard prior to suspending him *without pay*. *Ibid.* In so doing, the court announced a general, per se rule that "a governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard." *Id.* at 14a. The court erred in imposing this per se rule.

A. This Court Has Consistently Maintained That Procedural Due Process Requirements Must Be Applied Flexibly To Meet Particular Circumstances

Procedural due process constrains governmental actions that deprive individuals of "liberty" or "property" within the meaning of the Fifth and Fourteenth Amendments. *Mathews* v. *Eldridge*, 424 U.S. 319, 332 (1976). However, due process is not implicated every time an individual suffers a deprivation from government action. Thus, traditional due process analysis requires that the examining court identify the property interest created by law, because even a "grievous loss" will not trigger due process protection in the absence of a protected interest. See, *e.g.*, *Meachum* v. *Fano*, 427 U.S. 215, 224 (1976).

Only "[o]nce it is determined that due process applies" is it appropriate to ask "what process is due." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). The process due in any given circumstance will entail a balancing of the governmental and private interests that are affected. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. at 334. Under *Mathews*, the specific dictates of due process generally require consideration of three distinct factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and

(3) "the Government's interest, including the [governmental] function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335 (citing *Goldberg* v. *Kelly*, 397 U.S. 254, 263-271 (1970)).

It is well settled that " '[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961). Instead, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey*, 408 U.S. at 481. Flexibility in treatment is a necessary element of due process because "not all situations calling for procedural safeguards call for the same kind of procedure." *Ibid.* By imposing a per se rule that applies in all cases in which a public employer suspends an employee without pay, the court below failed to take account of these fundamental tenets.

B. A Pre-suspension Hearing Is Not Required So Long As The Government's Interest In Postponing Proceedings Is Weighty And Adequate Post-deprivation Procedures Are Provided

1. This Court has never directly addressed the question of what process must be afforded to a tenured public employee before he is suspended without pay. Nevertheless, the Court has generally recognized in suspension cases outside the public employment context that the governmental interest may be sufficiently weighty to warrant postponement of a hearing until after the initial deprivation. See, *e.g.*, *FDIC* v. *Mallen*, 486 U.S. 230, 240 (1988). In *Mallen* the Court reasoned that Congress had acted in a constitutionally appropriate manner by providing

for the prompt suspension of bank officers—with hearings available thereafter—because of the need to protect the interests of depositors and to maintain public confidence in banks. *Ibid.* That the statute under scrutiny permitted up to 90 days for completion of the post-deprivation hearing process did not alter the Court's conclusion. *Id.* at 243-244.

The court below distinguished *Mallen* on the basis that it was unclear whether the suspension in that case was without pay. See Pet. App. 12a n.2. Although the specific provision at issue in *Mallen* does not define the term "suspension," see 12 U.S.C. 1818(g)(1) (1982), it does provide that the agency may "suspend [the officer] *or* prohibit him from further participation in any manner in the conduct of the affairs of the bank," *ibid.* (emphasis added). And federal personnel statutory law defines "suspension" as "the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay." 5 U.S.C. 7501(2). Indeed, the Court's discussion in *Mallen* of the private interests at stake emphasizes the "severity of depriving someone of his or her livelihood." 486 U.S. at 243. The court below therefore lacked any persuasive basis for concluding that the suspension in *Mallen* was with pay.

Similarly, in *Barry* v. *Barchi*, 443 U.S. 55, 66 (1979), the Court weighed the reliance of the horse trainer on his license to earn a living. The Court held, however, that the State could suspend the license without a pre-suspension hearing so long as it made hearing procedures available promptly thereafter.[10] A substantial majority of the lower federal courts have adopted the position that a pre-deprivation hearing is not always necessary when a public employee has been suspended without pay.[11]

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[10] The Court's conclusion that the post-suspension hearing procedures were inadequate was entirely distinct from its balancing of the respective private and public interests in deter-

2. The court below placed primary reliance on a statement in *Loudermill* that "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by *suspending with pay*." Pet. App. 11a (quoting

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mining that a pre-suspension hearing was unnecessary. See 443 U.S. at 63-64.

[11] *E.g.*, *Jones* v. *City of Gary*, 57 F.3d at 1442 (successive suspensions of AWOL city fire fighter without pay and without pre-suspension hearing sustained where the post-deprivation hearing was found to provide adequate protection of employee's due process rights in light of governmental employer's overriding interests in public safety); *Ambus* v. *Granite Bd. of Educ.*, 975 F.2d at 1562 ("the substantiated knowledge that a teacher had been arrested for drug sales raised a substantial government interest justifying immediate suspension without pay; *Caine* v. *Hardy*, 943 F.2d 1406, 1412 (5th Cir. 1991) (en banc), ("Not even an informal hearing * * * must precede a deprivation undertaken to protect the public safety."), cert. denied, 503 U.S. 936 (1992); cf. *Bailey* v. *Board of County Comm'rs*, 956 F.2d 1112, 1123-1124 (11th Cir. 1992) (state officials were entitled to qualified immunity where corrections facility guard failed to show that he had a clearly established constitutional right to a pre-deprivation hearing prior to suspension without pay following his arrest on corruption charges); *Strong* v. *Board of Educ.*, 902 F.2d 208, 211-212 (2d Cir. 1990) (no due process violation found where adequate post-deprivation procedures were available to teacher barred from returning to classroom for refusing to provide medical evidence of fitness for duty following extended sick leave). Contra *Everett* v. *Napper*, 833 F.2d 1507, 1512 (11th Cir. 1987) (holding, without analysis, that pre-suspension hearing was required under *Loudermill* prior to fire fighter's suspension without pay for refusing to submit to urinalysis).

470 U.S. at 544-545) (emphasis added by court of appeals). In extrapolating this language into a per se rule that "suspension without pay must be preceded by notice and an opportunity to be heard in all instances," Pet. App. 11a, the court erred on several counts.

a. First, the court misperceived the context in which the *Loudermill* Court discussed the option of a "suspension with pay." That language was presented in a discussion of procedural alternatives a public employer could use prior to terminating the employee.[12] The holding of *Loudermill* reaffirmed that due process "requires 'some kind of a hearing' prior to the *discharge* of an employee who has a constitutionally protected property interest in his employment." 470 U.S. at 542 (emphasis added). The Court concluded that some form of pretermination hearing was needed because the governmental interest in immediate termination did not outweigh the significant private interest in retaining employment and the value of permitting the employee to present a response to the allegations of misconduct. *Id.* at 543-544. As the Court explained:

> [A]ffording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled,

---

[12] It is unclear whether the Third Circuit found *Loudermill* to be controlling because it viewed respondent's demotion as the equivalent of a termination, see Pet. App. 9a, or because the court viewed the suspension without pay as tantamount to a discharge. *Id.* at 11a.

> the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a qualified employee on than to train a new one. * * * Finally, *in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay.*

Id. at 544-545 (footnote omitted; emphasis added).

Although that passage suggests that a public employer concerned about the hazards posed by an employee staying in his duty station may satisfy due process by suspending the employee with pay, nothing in *Loudermill* indicates that a public employer *must* suspend with pay in every case to satisfy due process. Such a rule plainly conflicts with a long line of cases recognizing that due process is a flexible concept which calls only for those procedural protections demanded by the particular situation. See, *e.g.*, *Morrissey*, 408 U.S. at 481; *Cafeteria Workers*, 367 U.S. at 895.

Indeed, a suspension without pay generally entails far less weighty interests than a termination. Suspension involves an interruption, rather than a cessation, in pay; it reflects less seriously on the employee's reputation than does a termination for cause; and with respect to other benefits associated with employment, a suspension without pay generally will not have the same severe effects as a termination. In the federal system, for example, a suspension without pay does not interfere with life and health insurance coverage (unless the period of suspension exceeds one year), see 5 C.F.R. 870.501(d), 890.303(e), 890.502(b)(1), and credits for retirement benefits continue for a period of up to six months, 5 U.S.C. 8332(f).

b. The court of appeals' per se rule also gives no consideration to "the degree of potential deprivation that may be created by a particular decision," which the Court has identified as "a factor to be considered in assessing the validity of any administrative decisionmaking process." *Mathews*, 424 U.S. at 341; see also *Goldberg*, 397 U.S. at 263-264. At issue in *Mathews* was whether due process required that a disability benefit recipient be afforded an evidentiary hearing prior to the termination of his benefits. In concluding that it did not, the Court explained that "[s]ince a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim." *Mathews*, 424 U.S. at 340. The Court noted that the disability recipient's "potential injury [was] thus similar in nature to * * * the nonprobationary federal employee in *Arnett* [v. *Kennedy*, 416 U.S. 134, 146 (1974)]." *Ibid.* Although the Court acknowledged that the "hardship imposed upon the erroneously terminated disability recipient may be significant," it noted that the recipient could seek other forms of government assistance. *Id.* at 342; see also *Arnett*, 416 U.S. at 169 (Powell, J., concurring in part) (to overcome any temporary hardship public employee may rely on independent resources, secure a job in the private sector, or seek welfare benefits); *id.* at 201-202 (White, J., concurring in part and dissenting in part) (same).

The court below rejected the district court's conclusion that the deprivation suffered by Homar was "*de minimis*" because, although he ultimately received full backpay for the period of his suspension, "[f]or a period of approximately one month, Homar's very livelihood was threatened because he received no salary," and because "[a]s far as Homar knew at the time of his suspension he had no prospects whatsoever of receiving any wages for the indefinite duration of his suspension." Pet. App. 16a. In our view, this Court's decisions do not support the proposition that the indefiniteness of the suspension without pay of a tenured public employee necessarily requires pre-suspension hearings so long as (a) the government's reasons for not conducting a presuspension hearing are weighty and (b) an opportunity to be heard is provided reasonably promptly after the suspension. There was no assurance that the suspension in *Mallen* would be limited in duration, yet the Court upheld post-deprivation procedures that were required by statute to occur within 90 days of the initial suspension. See 486 U.S. at 243. Similarly, in *Mathews*, the termination of disability benefits was indefinite, yet the Court concluded that pre-deprivation procedures were unnecessary since the administrative scheme provided for an exchange of written information before the termination and for post-deprivation procedures within six months. See 424 U.S. at 324, 349. In both cases the Court carefully weighed the government's justification for not providing pre-deprivation procedures against the private interests affected. As we explain in Part II, that balancing was never properly done by the courts below.

C. A Rule Requiring Pre-suspension Hearings In All Cases Could Threaten Legislative Choices Reasonably Made By Congress Affecting Federal Employees

A per se rule that public employees are entitled to hearings prior to being suspended without pay would risk intruding on congressionally mandated procedures that are not presented in this case.

1. Under the CSRA scheme for federal employees, a nonsupervisory or nonmanagerial probationary employee in the competitive service[13] (*i.e.*, an individual who has not completed one year of continuous service) may be suspended and/or terminated without prior notice and without any type of hearing.[14] See 5 C.F.R. 315.804 (agency "shall terminate [probationer's] services by notifying him in writing as to why he is being separated and the effective date of the action").

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[13] An employee serving a probationary period in a supervisory or managerial position in the competitive service who does not satisfactorily complete the probationary period may be assigned to a position in the agency "of no lower grade and pay than the one the employee left to accept the supervisory or managerial position." 5 C.F.R. 315.907(a). The agency must provide written notice of the assignment to the employee (5 C.F.R. 315.907(c)), however, the employee generally has no right to appeal the assignment (5 C.F.R. 315.908(a)). But see 5 C.F.R. 315.908(b) (employee alleging that agency action was based on partisan political affiliation or marital status may appeal to MSPB).

[14] Pennsylvania law is to the same effect. See, *e.g.*, *Boykin* v. *Bloomsburg Univ.*, 893 F. Supp. 378, 395 (M.D. Pa. 1995) (state university was free to suspend, terminate, or take other disciplinary action against probationary employee without providing notice and opportunity to be heard as would be required with permanent, tenured employee).

Thus, while a federal agency must provide a probationary employee with written notice of his discharge, and the reasons for that action, such an employee has no statutory right to a pre-termination hearing.[15] See *United States Dep't of Justice, INS* v. *FLRA*, 709 F.2d 724, 727-728 (D.C. Cir. 1983) ("[i]n stark contrast to the * * * elaborate procedural protections available to those who have completed their probationary terms," CSRA provides only for summary termination of probationary employees). Tenured employees, on the other hand, have the right under the CSRA not to be suspended, demoted, or removed except "for such cause as will promote the efficiency of the service." 5 U.S.C. 7503, 7513. Such employees who are suspended without pay are afforded pre-deprivation notice and an opportunity to respond if the suspension is for less than 14 days; if the suspension is for more than fourteen days, such employees also are entitled by statute to a post-deprivation opportunity for a right to respond and a hearing. 5 U.S.C. 7503(b), 7513(b); 5 C.F.R. 752.203, 752.404. A federal employee's expectation of an uninterrupted stream of pay, therefore, is conditioned by Congress.[16]

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[15] An exception to this general rule is when an agency proposes to terminate a probationary employee "for reasons based in whole or in part on conditions arising before his appointment." 5 C.F.R. 315.805. In such a case, the employee is entitled to advance written notice of the proposed termination and a reasonable time for filing a written response. 5 C.F.R. 315.805(a) and (b).

[16] Although the court of appeals noted the lack of a dispute between the parties as to the existence of a property interest, Pet. App. 9a, the nature and contours of that entitlement are not in the record, and the court's broad statement of the

2. Similarly, in the national security area, Congress has determined that an employee suspected of treason may be summarily suspended without pay. 5 U.S.C. 7532(a). In such a case, the employee (who is a citizen and has a permanent or indefinite appointment) is entitled to a post-suspension notice of the reasons for the suspension (but only to the extent that the agency determines that the interests of national security permit) and a post-suspension hearing. 5 U.S.C. 7532(c). Thus, in the national security context Congress has made a legislative judgment of the weighty governmental interests in an abbreviated process when the government has credible information that an employee has engaged in conduct that threatens national security.

In both the probationary employee and national security contexts, therefore, adoption of the court of appeals' per se rule would inappropriately cast doubt on the validity of federal statutory provisions in a case not properly before this Court.

II. THE CASE SHOULD BE REMANDED FOR CONSIDERATION OF THE ADEQUACY OF POST-SUSPENSION PROCEEDINGS

Our disagreement with the court of appeals' application of a per se rule does not in any way manifest disregard of the "'root requirement' of the Due Process Clause" that ordinarily an individual must be given an opportunity for a hearing "*before* he is deprived of a significant property interest." *Loudermill*, 470 U.S. at 542 (quoting *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971) (italics in *Boddie*). But

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applicable rule for suspensions does not distinguish between tenured and non-tenured public employees. See Pet. App. 14a.

because the district court concluded that the deprivation of the property interest being asserted by Homar was "*de minimis*," Pet. App. 63a, and the court of appeals erroneously held that a public employee is always entitled to a hearing before being suspended without pay, neither court conducted the appropriate balancing of interests required by this Court's precedents. The case, therefore, should be remanded for further proceedings.

The record, for example, contains no explicit findings—and precious little evidence—as to the nature and extent of Homar's asserted loss. It does not, for example, reflect when he actually ceased being paid (*i.e.*, whether his pay stopped before he was given an opportunity to be heard), when the reduction in his pay took effect, and the extent of his actual deprivation prior to his being afforded a hearing. The record does not include the collective bargaining agreement that governs many of the parties' respective substantive and procedural rights. Nor does it reflect the reasons why petitioners suspended Homar without pay without providing a pre-suspension hearing. The district court appeared to assume interests in law enforcement integrity and public safety that address the suitability of Homar remaining in a duty status but that do not concern the appropriateness of his being suspended without pay. See Pet. App. 61a-62a.

In addition, assuming that the governmental interest may justify the postponement of a hearing on Homar's suspension, the court of appeals' decision did not address the adequacy and promptness of the post-deprivation process. "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Mallen*, 486 U.S. at 240; see also *Barry*, 443 U.S. at 64-65. The promptness of post-suspension hearing procedures is measured by balancing the importance of the private interest and the harm that the delay may cause to this interest, the justification given by the government for the delay and its relation to the underlying governmental interest, and the likelihood that the interim decision may have been in error. *Mallen*, 486 U.S. at 242.

Because the court of appeals incorrectly held that nothing less than a pre-deprivation hearing would ever pass constitutional muster and did not remand the case for evaluation by the district court of the factors specified in *Mathews* and its progeny, the judgment should be vacated. The case should be remanded for further development of the extent of the deprivation suffered by Homar; the appropriateness of the justifications for not affording Homar a hearing prior to his suspension without pay; and, if those justifications suffice, the adequacy of the post-suspension procedures provided by the university.

CONCLUSION

The judgment of the court of appeals should be vacated and remanded.

Respectfully submitted.

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FEBRUARY 1997

No. 96-651 (3)

Supreme Court, U.S.
FILED
FEB 10 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JAMES E. GILBERT, *et al.*,
Petitioners,
v.
RICHARD J. HOMAR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether suspension without pay of public employees must in all instances be preceded by notice and an opportunity to be heard.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. *Amici* and their members have an especially strong interest in legal issues affecting public sector labor relations.

The court of appeals held that "suspension without pay must be preceded by notice and an opportunity to be heard in all instances." Pet. App. 11a. This rigid *per se* rule applies regardless of the weight and source of the evidence against the employee and the importance of the governmental interests implicated by the employee's misconduct. Here, for example, the court of appeals held that state officials violated the Due Process Clause when they suspended a university police officer on the basis of his arrest by state police during a drug raid. In the court of appeals' view, due process requires in all cases that a public employer provide either a pre-suspension hearing or continue payment of salary until a hearing is provided; the employer's provision of timely post-deprivation process is irrelevant.

The lower court's holding cannot be squared with the extensive line of cases in which this Court has upheld the government's authority to use summary procedures to protect important interests, provided adequate post-deprivation process is available. Moreover, the purpose served by a pre-suspension hearing is to protect against unwarranted decisions; where, as here, a public employer's suspension decision is based on a finding of other independent authorities, it is unreasonable to require employers to provide pre-deprivation process.

Because of the importance of the question presented to *amici* and their members, this brief is submitted to assist the Court in the resolution of this case.[1]

STATEMENT

Respondent Richard J. Homar was employed as a police officer by East Stroudsburg State University (ESU). On the morning of August 26, 1992, Homar was arrested by the Pennsylvania State Police during a drug raid of the apartment of James Compton. Pet. App. 49a. A state police officer interviewed Homar that day, and the next day filed a supplemental report stating that Homar admitted knowing that Compton and another individual, Joseph Habhab, were marijuana dealers and that Habhab had provided Homar with marijuana for his personal use. *Id.* at 50a-51a.

On the day of Homar's arrest, the state police called petitioner David Marazas, Chief of the ESU police force, to inform him that Homar had been arrested and charged with various drug offenses. *Id.* at 49a. Marazas informed petitioner Gerald Levanowitz, ESU's Director of Human Resources, who decided to suspend Homar immediately without pay. *Id.* at 50a. Homar did not report for his shift that day. *Id.*

The next day, Homar called Marazas to inform him of his arrest and to ask if he was suspended. *Id.* Marazas informed Homar that he was suspended and would receive a suspension letter later in the day. *Id.* The letter stated that Homar was suspended pending further investigation and that ESU's final decision would not necessarily coincide with the resolution of the criminal charges. *Id.*

---

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

After the criminal charges against Homar were dropped, Levanowitz continued to investigate the incident, meeting with the state police. *Id.* at 52a. According to Levanowitz's notes, one of the troopers told him that during the raid, "a metal plate used for processing and cutting marijuana" was observed in Homar's vicinity. *Id.* at 53a. Two of the troopers told Levanowitz that they observed "four marijuana 'joints' on the coffee table where Homar had been sitting and one of the joints was half burned and that there was a heavy odor of marijuana smoke in the house." *Id.* at 53a.

At a meeting conducted on September 18th, Levanowitz advised Homar " 'that the State Police had given [him] some evidence very serious in nature,' " *id.* at 54a (quoting Levanowitz Dep. at 48), and requested Homar's " 'side of the story.' " *Id.* (quoting Dkt. Entry #22, at § 24). Levanowitz, however, did not disclose during the meeting that he had received a copy of the supplemental report, which contained the admissions Homar had made when interviewed by the state police on the day of his arrest. *Id.* In his letter demoting Homar, Levanowitz stated that his decision was based on the admissions Homar made to the state police. *Id.* at 55a.

Homar's union representatives subsequently asked petitioner James Gilbert, President of ESU, for a meeting. *Id.* at 56a. By the time of the meeting, which was held on September 24, Homar had obtained a copy of the supplemental report. *Id.* At the meeting with President Gilbert, Homar was accompanied by two union officials, Connell and Pottiger. *Id.* at

56a-57a. Pottiger subsequently "affirmed that Gilbert provided Homar with a full opportunity to respond to the charges and the discipline Levanowitz imposed." *Id.* at 57a (citing Pottiger Dep. at 22). At Homar's request, President Gilbert conducted part of the meeting without Levanowitz being present. *Id.* President Gilbert sustained Homar's demotion. *Id.*

Homar then challenged his demotion under the grievance procedures in the collective bargaining agreement. *Id.* Both the State System of Higher Education (step 3) and the Commonwealth's Office of Labor Relations (step 4) denied Homar's grievance. *Id.* Homar's union had the right to pursue arbitration but chose to withdraw the matter, whereupon Homar commenced this suit. *Id.*

SUMMARY OF ARGUMENT

1. The court of appeals held that a public employer must in all instances provide notice and a hearing prior to suspending an employee without pay. This rule is irreconcilable with this Court's flexible approach to due process and its longstanding recognition of governmental authority to use summary procedures to protect important public interests as long as there is adequate post-deprivation process.

The Court has routinely upheld the use of summary procedures when public safety interests are implicated. It has also upheld the use of such procedures to protect public confidence in non-governmental institutions including banking and horse racing. The governmental interest implicated here—preserving public confidence in the integrity of police officers—is, as the court of appeals recognized, "compelling" and justifies the summary suspension which the University imposed on respondent after he was arrested in a drug raid.

Contrary to the court of appeals, due process did not require the University to continue paying respondent until he received a hearing. The Court's cases recognize that even as substantial an interest as maintaining one's livelihood must at times yield to the government's interest in taking prompt action. For example, in *FDIC v. Mallen*, 486 U.S. 230 (1988), the Court upheld the summary suspension of a bank officer for up to ninety days notwithstanding that the deprivation denied him the right to work in his chosen profession and possibly imposed significant financial hardship. The University did not violate Homar's procedural due process rights when it provided a hearing four weeks after it suspended him without pay.

Moreover, the purpose of a pre-suspension hearing is to prevent erroneous deprivations. The Court, however, has recognized that where there is "a substantial assurance that the deprivation is not baseless or unwarranted," *id.* at 240, additional predeprivation process is not required because it is of little "probable value" in preventing "an erroneous deprivation." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). As the court of appeals acknowledged, Homar's arrest provided a substantial assurance that his suspension was "not baseless or unwarranted." Pet. App. 11a. Due process thus did not require the University to provide a pre-suspension hearing.

2. The court of appeals' extension of *Loudermill* to require in all cases that public employers provide notice and a hearing before suspending an employee without pay is ill-conceived. Where, for example, authorities independent of the workplace determine

that there is probable cause to believe that an employee has committed an offense demonstrative of an employee's lack of fitness for continued employment, public employers should be able to rely on that determination to suspend without a hearing. Such a determination provides a substantial assurance that the employer's suspension decision is warranted and serves as an adequate substitute for a *Loudermill* hearing.

Moreover, where independent authorities have filed criminal or administrative charges, a pre-deprivation hearing can be a trap for the unwary as employees make either incriminating admissions or statements which can be used to impeach them in the criminal or administrative proceeding. Finally, public employers have numerous incentives to make considered and correct suspension decisions. Suspension decisions are disruptive and costly; an employer is likely to incur litigation costs, overtime payments, and training costs. The employer also bears the risk of a backpay award if the suspension is not upheld. It is thus unnecessary to require public employers to provide a pre-suspension hearing in all cases.

ARGUMENT

THE DUE PROCESS CLAUSE DOES NOT REQUIRE A PUBLIC EMPLOYER TO PROVIDE A HEARING PRIOR TO SUSPENDING AN EMPLOYEE WITHOUT PAY IN EVERY CASE, PARTICULARLY WHEN THERE IS AN INDEPENDENT SOURCE OF PROBABLE CAUSE TO BELIEVE THAT THE EMPLOYEE IS UNFIT FOR CONTINUED SERVICE

The court of appeals created a rule applicable "in all instances," Pet. App. 11a, "that a governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing." *Id.* at 14a. This rigid rule is irreconcilable with this Court's flexible approach to due process and its longstanding recognition of governmental authority to use summary procedures—subject to adequate post-deprivation process—where important public interests are at stake.

Here, the court of appeals acknowledged "that there was a compelling governmental interest which supports ESU's decision to suspend Homar immediately and without a hearing pending further investigation." *Id.* at 11a. It also observed that "[t]he university has a substantial interest in maintaining public confidence in the ESU police force, and Homar's arrest on drug charges certainly suffices to ensure that the university's concerns were not baseless or unwarranted, as required by the Supreme Court." *Id.* (citing *FDIC v. Mallen*, 486 U.S. 230, 240 (1988)). It further noted that "[i]n circumstances where public safety is implicated, '[n]ot even an informal hearing . . . must precede a deprivation.'" *Id.* (quoting *Caine v. Hardy*, 943 F.2d 1406, 1412 (5th Cir. 1991) (en banc), *cert. denied*, 503 U.S. 936 (1992)).

The court of appeals nonetheless held "that Homar's due process rights were violated because he was suspended *without pay*." Pet. App. 11a. According to the court, in *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985), this Court "noted that it had 'frequently recognized the severity of depriving a person of the means of livelihood.'" Pet. App. 11a (quoting 470 U.S. at 543). And invoking dictum, the court asserted that *Loudermill* "explained that, while . . . there were some limited instances in which a strong governmental interest might warrant immediately removing a person from a position without a hearing, 'in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem *by suspending with pay.*'" *Id.* (quoting 470 U.S. at 544-45) (emphasis added by court of appeals). The court thus held that "a governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard." *Id.* at 14a.

As the underlying facts of this case demonstrate, the court of appeals' rigid *per se* rule applies regardless of the seriousness of the employee's misconduct, its nexus to compelling public interests, and the strength of the evidence against the employee. Where, as here, substantial evidence of employee misconduct probative of a lack of fitness or trustworthiness for a position has been established by authorities independent of the workplace, there is "a substantial assurance that the deprivation [is] not baseless or unwarranted," Pet. App. 30a (Alito, J., dissenting), and a pre-suspension hearing is unnecessary. Because the University timely provided a full range of post-deprivation procedures to correct any error, respondent received all the process he was due. The Court should therefore reverse the judgment of the court of appeals.

A. The Due Process Clause Does Not Require A State To Provide Pre-Deprivation Process When Important Public Interests Are Affected

This Court has long recognized that "'"[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Mathews v. Eldridge*, 424

U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)). Rather, " 'due process is flexible and calls for such procedural protections as the particular situation demands.' " *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). In determining what process is due one who has been deprived of a constitutionally cognizable interest, the Court has accordingly instructed that "three distinct factors" be considered:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. *See also Loudermill*, 470 U.S. at 542-43.

While the Due Process Clause ordinarily requires " 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest,' " *Loudermill*, 470 U.S. at 542 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)), there are "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie*, 401 U.S. at 379. *See also Loudermill*, 470 U.S. at 542 n.7 ("There are, of course, some situations in which a postdeprivation hearing will satisfy due process requirements."). In a long line of cases, the Court has thus upheld the deprivation of a wide variety of property interests prior to notice and hearing when necessary to protect important public interests, as long as an adequate post-deprivation remedy is provided. *See Mallen*, 486 U.S. at 240-41 (suspension of indicted bank president); *Hodel v. Virginia Surface Min. & Reclam. Ass'n*, 452 U.S. 264, 299-303 (1981) (order to cease strip mining); *Barry v. Barchi*, 443 U.S. 55, 64-65 (1979) (suspension of horse trainer's license); *Mackey v. Montrym*, 443 U.S. 1, 11-19 (1979) (suspension of driver's license); *Dixon v. Love*, 431 U.S. 105, 112-15 (1977) (same); *Goss v. Lopez*, 419 U.S. 565, 582-83 (1975) (suspension of public school students); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598-600 (1950) (seizure of misbranded articles); *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 315-20 (1908) (seizure and destruction of food unfit for human consumption); *Lawton v. Steele*, 152 U.S. 133, 139-42 (1894) (seizure and destruction of fishing nets used in violation of state law); *see also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 677-80 (1974) (upholding summary seizure of yacht to enable government to assert *in rem* jurisdiction).

In these cases, the Court has repeatedly recognized that pre-deprivation procedures are not required when public safety interests are implicated. Thus, the Court in *Goss*, while holding that the Due Process Clause usually requires school administrators to provide a hearing prior to suspending a student for disciplinary violations, nonetheless recognized "that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school." 419 U.S. at 582.

Other cases reflect a similar concern. In *Hodel*, the Court upheld the federal government's authority to summarily order the cessation of strip mining to protect against " 'imminent danger to the health and safety of the public.' " 452 U.S. at 301 (quoting 30 U.S.C. § 1291(8)). The Court observed that "[p]rotection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action," and that the "deprivation of property to protect the public health and safety is '[o]ne of the oldest examples' of permissible summary action." *Id.* at 300 (quoting *Ewing*, 339 U.S. at 599).

In *Mackey*, the Court upheld the summary suspension of a driver's license for failure to submit to a breathylyzer test, observing that "[w]e have traditionally accorded the states great leeway in adopting summary procedures to protect public health and safety." 443 U.S. at 17. And in *Dixon*, the Court upheld the summary suspension of a driver's license for accrual of too many points for traffic law violations within a given time period, noting "the important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard." *See* 431 U.S. at 113. *Ewing* and *North American Cold Storage*, which upheld the government's authority to seize items injurious to the public without first providing notice and hearing, likewise reflect an acknowledgement that the protection of important public safety interests requires that the government be able to act first and provide due process later. *See Ewing*, 339 U.S. at 599-600; *North American Cold Storage*, 211 U.S. at 320 (where post-deprivation remedy available, "due process of law is not denied the owner or custodian by the destruction of the food alleged to be unwholesome and unfit for human food without a preliminary hearing").

The Court's extensive line of cases upholding the government's authority to use summary procedures makes clear two additional points of import for this case. First, the government's authority to use summary procedures is not limited to those instances in which the deprivation is necessary to protect against physical harm. Both *Mallen*, which upheld the summary suspension of an indicted bank officer "to protect the interests of depositors and to maintain public confidence in . . . banking institutions," 486 U.S. at 241, and *Barchi*, which upheld the summary suspension of a horse trainer's license to preserve "the integrity of the racing carried on under [the State's] auspices," 443 U.S. at 64, demonstrate that preserving the public trust in even non-governmental institutions and activities is a substantial enough interest to warrant a State's use of summary procedures. It is indisputable that the government's interest in preserving the public trust in the integrity of law enforcement personnel is as weighty an interest as preserving public confidence in banks or the integrity of horse racing.

Second, *Mallen* and *Barchi* demonstrate that even as substantial an interest as maintaining one's livelihood must at times yield to the government's interest in taking prompt action to preserve the public trust. Both the State's imposition of a short term suspension of a horse trainer's license and the FDIC's suspension of a bank president from his duties for up to ninety days denied these persons the right to work in their chosen professions and possibly imposed significant financial hardship. *See Barchi*, 443 U.S. at 66; *Mallen*, 486 U.S. at 243; *see also* Brief of Appellee, *Mallen*, No. 87-82, at 7-8. Moreover, while the provision of post-deprivation process might result in the restoration of the trainer's license in *Barchi* or the termination of the bank officer's suspension in *Mallen*, due process has never been held to require the government to compensate for any economic loss occasioned by its use of summary procedures. This stands in stark contrast to the process respondent received, which provided back pay notwithstanding that petitioners were, as the court of appeals acknowledged, justified in imposing an immediate suspension, Pet. App. 11a, which was subsequently upheld at every stage of appeal. *Id.* at 57a.

The court of appeals' holding "that suspension without pay *must* be preceded by notice and an opportunity to be heard *in all instances*," Pet. App. 11a (emphasis added), cannot be reconciled with these cases. It ignores that the Court has repeatedly upheld the government's authority to take summary action depriving persons of property interests which are the functional equivalent of the loss of remuneration suffered by respondent here. *See Mallen*, 486 U.S. at 240-41, 243; *Barchi*, 443 U.S. at 64-65; *Love*, 431 U.S. at 110 (driver's license of truck driver). It ignores that the Court has upheld such deprivations to protect governmental interests which, while substantial, are arguably not of the same magnitude as what the court of appeals acknowledged was the "compelling governmental interest" in maintaining public confidence in the university's police force "which support[ed] ESU's decision to suspend Homar immediately and without a hearing pending further investigation." Pet. App. 11a. It ignores that in this case there was a period of only four weeks between the initial deprivation and the post-deprivation process, and that the process the State provided included the remedy of back pay.

It further ignores that in this case, there was ample evidence—which was developed independently of the workplace—demonstrating that "there [was] little likelihood that the deprivation is without basis." *Mallen*, 486 U.S. at 244. Like the indictment in *Mallen* and the drug test in *Barchi*, the probable cause established by Homar's arrest on drug charges by the state police was more than enough to establish his lack of fitness to serve as a police officer pending further investigation.

Indeed, even the court of appeals acknowledged that "Homar's arrest on drug charges certainly suffices to ensure that the university's concerns were not baseless or unwarranted." Pet. App. 11a. It nonetheless held that ESU was required to provide a pre-deprivation hearing. The very foundation of the Court's holdings authorizing summary suspensions in both *Mallen* and *Barchi* is that where there is "[a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted," additional pre-deprivation process is unnecessary. *Mallen*, 486 U.S. at 240; *see also Barchi*, 443 U.S. at 64-65 ("whenever [the State] has satisfactorily established probable cause . . . there is substantial assurance that the trainer's interest is not being baselessly compromised"). This is because it would be of little "probable value" in preventing "an erroneous deprivation." *Mathews*, 424 U.S. at 335. Because there was a "substantial assurance" that ESU's decision to suspend Homar was "not baseless or unwarranted," the Due Process Clause did not require a pre-suspension hearing. *Mallen*, 486 U.S. at 240.

B. *Loudermill* Should Not Be Extended To Require That All Summary Suspensions Be With Pay

The court of appeals' extension of *Loudermill* to impose a rigid *per se* rule requiring public employers to provide notice and a hearing before suspending without pay is thus at odds with this Court's more flexible conception of due process. Due process does not require that public employees receive notice and a pre-deprivation opportunity to respond in all cases. Such a rule is not only unnecessary, it would impose substantial costs on public employers.

An employee's interest in not being arbitrarily deprived of a job and its salary is, of course, substantial. The Due Process Clause, however, does not require process simply for its own sake but rather to reduce the risk of arbitrary and erroneous decisionmaking. Thus, while a *Loudermill* hearing may serve this valuable purpose in many instances, such will not always be the case. Where, for example, "an independent body," whether it be the police, a grand jury, or a drug testing lab, "has determined that there is probable cause to believe" that an employee has committed an offense and that offense demonstrates a lack of fitness for continued employment, there is a "substantial assurance" that the suspension is "not baseless or unwarranted" and a pre-suspension hearing should not be constitutionally required.[2] *Mallen*,

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[2] This listing of independent authorities is not exclusive. For example, a government lawyer might be accused of ethical violations by a state ethics board, a government physician might be accused of malpractice by a state licensing

486 U.S. at 240, 244-45. In such circumstances, public employers are entirely justified in relying on the determinations made by other authorities; only in rare cases would providing an opportunity to respond at this stage be likely to yield information that would cause a public employer to alter a suspension decision.

Moreover, where an employer takes disciplinary action based on the filing of criminal or administrative charges by other authorities, a pre-deprivation opportunity to respond can be a trap for the unwary rather than a meaningful hearing. During the course of such a hearing, an employee might well make either incriminating admissions or statements which could be used to impeach their testimony in a criminal or administrative proceeding. Those employees who are aware that a statement made to an employer can be used against them in proceedings which could result in imprisonment or the loss of a professional license are not likely to avail themselves of this "opportunity."

It is especially unreasonable to impose such a rule where independent authorities have established probable cause that an employee has engaged in misconduct, which, if proved, would be punishable by a suspension or termination from employment. The very definition of probable cause is that reasonable people would believe it more likely than not that the person committed the offense. *See, e.g.*, Black's Law Dic-

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board, and the captain of a government operated ferry might be subjected by the Coast Guard to a license revocation proceeding for being intoxicated while on duty. In each case, a public employer would have a reasonable basis for suspending an employee without pay and without a pre-suspension hearing.

tionary 1201 (6th ed. 1990). If it is objectively more likely than not that an employee committed an offense punishable by suspension without pay or outright termination, it is not reasonable to require governmental employers to continue to pay the employee. Indeed, the court of appeals' rule would frequently result in undeserved windfalls to employees because whenever an employee's termination is ultimately upheld, the costs of filing a suit to recover pay will prevent the government from seeking restitution. On the other hand, where the charges against the employee are dismissed in a post-deprivation proceeding, the employee can be made whole through the remedy of back pay.

Public sector employers do not take lightly the decision to suspend an employee. Suspending an employee is frequently both disruptive, *see Loudermill*, 470 U.S. at 544, and costly: the employer is likely to incur substantial litigation costs, overtime payments to other employees who must shoulder the burden formerly carried by the suspended employee, and the costs of training a replacement. Moreover, the employer risks a back pay award for a period in which it has received no work in return. These consequences, along with the desire of public employers to be fair to their employees, provide a very strong inducement to make considered and correct suspension decisions. Such incentives, coupled with an independent authority's probable cause finding, demonstrate the unreasonableness of the court of appeals' rule.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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February 10, 1997

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Supreme Court, U.S.
FILED
FEB 11 1997
CLERK

No. 96-651

In the

Supreme Court of the United States

October Term, 1996

◆

JAMES E. GILBERT, *et al.*
Petitioners,

v.

RICHARD J. HOMAR,
Respondent.

◆

On Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

◆

BRIEF OF THE STATES OF ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, KANSAS, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, TENNESSEE, TEXAS AND UTAH, AND THE TERRITORY OF THE VIRGIN ISLANDS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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The amici curiae states and territory, through their undersigned attorneys general, respectfully submit this brief in support of petitioners.

INTEREST OF THE AMICI CURIAE

State governments and their political subdivisions are among the nation's largest employers. As such, they frequently have to grapple with the problem of employees who abuse their positions, commit crimes or engage in other misconduct. Handling such situations is difficult for any employer, and the appropriate response depends upon a variety of considerations. The decision below strictly limits the states' discretion in this regard, forbidding them from ever suspending an employee without pay immediately after obtaining strong evidence of the employee's wrongdoing unless they conduct a preliminary hearing.

The 26 amici states and territory have a direct interest in this case because that blanket rule, if accepted by this Court, would considerably hamstring the states' efforts to control their workplaces, threaten the public safety, diminish their credibility in the eyes of the public and cause significant budgetary and morale problems. The Due Process Clause provides an indispensable floor on procedures states must provide their employees, but it has heretofore been understood to be a flexible concept capable of accommodating the gamut of circumstances. When an employee charged with important public service duties commits egregious wrongdoing, the Due Process Clause should not be construed to bar, in all cases, a state from immediately imposing the sanction of suspension without pay pending a post-suspension hearing.

SUMMARY OF ARGUMENT

A. A blanket rule barring states from ever suspending employees without pay absent a pre-suspension hearing conflicts with this Court's due process jurisprudence. The Court has long held that due process is a flexible concept; the sufficiency of procedures is determined on a case-by-case basis after weighing the private interests, the risk of erroneous deprivation and the governmental interests. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

B. In certain limited situations -- where the government needs to act immediately to protect the public interest and acts on strong evidence -- the *Eldridge* factors weigh in favor of summary deprivations of private interests. Accordingly, this Court has held that post-deprivation procedures alone can be adequate, and has upheld the suspension from work without a prior hearing of persons charged with wrongdoing. *See Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240-41 (1988); *Barry v. Barchi*, 443 U.S. 55, 64-66 (1979).

C. The proposed blanket rule carves out an exception to the *Eldridge* balancing test for the deprivation of wages without a prior hearing. No decision of this Court establishes such an exception. The court below relied solely upon inconclusive *dicta* in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), a case which recognized the occasional appropriateness of summary government actions. *Id.* at 542 n.7. Moreover, there is no sound reason to create a blanket rule shielding employee's wages from temporary interruptions without a prior hearing. Wages are not intrinsically more important than various other private interests which the Court has held can be adequately protected by post-deprivation procedures. And the availability of backpay generally mitigates the private interest in wages.

The proposed blanket rule is premised on the erroneous assumption that governments have only a minor interest in the cost of paying suspended employees. In fact, state and local governments and departments operate on tight budgets and often cannot pay a suspended employee plus a temporary replacement for the suspended employee. As a consequence, the court below's decision would force many state and local police, fire and other departments to choose between utilizing employees who have engaged in wrongdoing or being understaffed. Paying suspended employees also harms governments by alienating those employees still on the job, and by undermining public confidence in the government.

D. Were the *Eldridge* balancing test applied in this case, the state's actions would have been upheld. The suspension followed an arrest based on probable cause, reducing the risk of erroneous deprivation; the government interest in maintaining a well-run police force is compelling; and the private interest was mitigated by the availability of backpay.

ARGUMENT

THE DUE PROCESS CLAUSE DOES NOT IMPOSE A BLANKET RULE BARRING STATES FROM EVER SUSPENDING THEIR EMPLOYEES WITHOUT PAY ABSENT A PRE-SUSPENSION HEARING

A. This Court Has Long Held That The Requirements Of The Due Process Clause Are Flexible And Depend Upon A Case-By-Case Analysis

By its very nature, the determination whether the government has afforded an individual sufficient procedures to satisfy the Due Process Clause must be made on a case-by-case basis. There are myriad permutations of governmental interests, evidentiary support for government action, private interests, and pre-deprivation and post-deprivation procedures. For this reason, this Court has recognized that "'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstance." *Mathews v. Eldridge,* 424 U.S. 319, 334 (1976) (quoting *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)). Rather, "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

This has not meant, of course, that the due process analysis has been standardless or arbitrary. The Court in *Eldridge* summarized due process jurisprudence as requiring the consideration of three factors in determining whether adequate process has been provided: the private interest; the risk of erroneous deprivation of that interest through the procedures used, and the probable benefit of additional or substitute safeguards; and the government's interest. 424 U.S. at 335. This three-part test has been applied by this Court and lower courts for the past twenty years to a wide array of situations ranging from the discipline of school children, *Ingraham v. Wright*, 430 U.S. 651, 675 (1977), to parental termination proceedings, *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27 (1981), to the discharge of state employees, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433-35 (1982). Adoption of the blanket rule proposed by the court below would be a marked departure from this well-established approach to procedural due process cases.

B. Post-Deprivation Proceedings Alone Have Often Been Held To Satisfy Due Process

When a state conducts a hearing prior to depriving a person of a liberty or property interest, the risk of erroneous deprivation is often reduced. Nevertheless, it cannot be gainsaid that there are situations where the governmental interest in immediate action is great, and a pre-deprivation hearing could only be accomplished at great risk or cost to the public. The very strength of the *Eldridge* balancing test -- and no doubt the reason for its durability -- is that it can accommodate these competing interests. Accordingly, this Court has many times ruled that where the governmental interest is significant and the evidentiary basis of the government's action is powerful and straightforward, an immediate deprivation is permissible. *See, e.g., Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240-41 (1988) (suspension of bank officer); *United States v. Von Neumann*, 474 U.S. 242, 248-51 (1986) (customs officials' seizure of automobile at the border); *Barry v. Barchi,* 443 U.S. 55, 64-66 (1979) (suspension of race horse trainer); *Dixon v. Love*, 431 U.S. 105, 112-15 (1977) (revocation of driver's license); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-80 (1974) (seizure of yacht used for unlawful purposes); *North Am. Cold Storage Co. v. City of Chicago,* 211 U.S. 306, 314-21 (1908) (seizure of contaminated food).

Of particular relevance here, the Court has upheld statutes authorizing the government to suspend persons from their employment without a pre-suspension hearing. In *Mallen*, the Court considered the constitutionality of a federal banking statute, 12 U.S.C. § 1818(g)(1), which authorizes the immediate, pre-hearing suspension of an officer and director of a federally insured bank after formally being charged with a felony involving dishonesty or breach of trust. 486 U.S. at 232-35. After Mallen was indicted by a federal grand jury with making false statements to the FDIC and the bank, the FDIC issued an *ex parte* order suspending Mallen and prohibiting him from further participation in any manner in the conduct of the affairs of the bank or in any other FDIC-insured bank. *Id.* at 236-38. In upholding the statute, the Court ruled that "an important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Id.* at 240.

As the Court further observed in *Mallen*, suspensions prior to hearings may be appropriate even where the governmental interest is not as weighty as maintaining confidence in our banking institutions. 486 U.S. at 241. In *Barry v. Barchi*, the Court held that the Due Process Clause was not violated by a statute authorizing summary suspensions of race horse trainers after their horses test positive for certain drugs. 443 U.S. at 64. Because the state "has an important interest in assuring the integrity of the racing" and a testing official affirmed that the petitioner's horse had been drugged, "the State need not postpone a suspension pending an adversary hearing." *Id.* at 65.

In both of these cases, the Court took a hard look at the strength of the government's interest, the weight of its evidence, and the availability of post-deprivation procedures. Summary suspensions based upon weaker evidence or serving lesser governmental objectives may not have fared as well. A categorical, one-size-fits-all rule, such as that proposed by the court below, is inconsistent with these decisions.

C. There Is No Basis In Reason Or This Court's Precedents To Carve Out An Exception To The *Eldridge* Balancing Test For The Deprivation Of Wages Without A Prior Hearing

1. The court below's reliance on *dicta* in *Cleveland Board of Education v. Loudermill* was misplaced

At issue in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), was an Ohio statute which provided that civil servants, regardless of the circumstances, were not entitled to a hearing prior to being terminated for cause. This Court rejected that blanket bar on pre-deprivation procedures. *Id.* at 542-43. The holding in that case in no way conflicts with the position of petitioners here, which is that the government be given the right, on rare occasion, to immediately suspend without pay certain employees. Such a need was found not to exist in *Loudermill*, where the only alleged wrongdoing was misrepresentation on employment forms submitted years earlier. *Id.* at 545 n.10.

The court below relies on the statement in *Loudermill* that, "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." Pet. App. 11a (quoting *Loudermill*, 470 U.S. at 544-45). This statement is *dicta*, as respondent concedes. Brief in Opposition at 4. Moreover, it does not purport to state a general prohibitory rule. It merely restates the obvious -- that a state which chooses to pay a suspended employee has a stronger case against a procedural due process challenge than a state which does not pay a suspended employee. Simply put, nothing in *Loudermill* compels the conclusion that the *Eldridge* balancing test should be discarded in suspension without pay cases. Indeed, the opinion counsels just the opposite, stating that "[t]here are, of course, some situations in which a postdeprivation hearing will satisfy due process requirements." *Id.* at 542 n.7 (citing *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950); *North Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908)).

It bears mention that the Court in *FDIC v. Mallen* -- issued only three Terms after *Loudermill* -- did not address whether Mallen was suspended without pay. Although Mallen's opening brief on the merits (at 7-8) argued that he was deprived of an "income stream to underwrite" the expense of defending a criminal prosecution during the suspension, the opinion makes no mention of this. The Court plainly did not find dispositive whether or not Mallen was paid during his suspension -- as it would have were respondent's position correct. Similarly, the suspension in *Barchi* presumably prevented the race horse trainer from earning income during the suspension. See *Barchi*, 443 U.S. at 73 ("[n]ot only does a trainer lose the income from races during the suspension . . . .") (Stevens, J., dissenting). The Court again was not troubled by that prospect.

2. There Is No Principled Basis On Which To Carve Out An "Employee's Pay" Exception

Adoption of a *per se* rule that the Due Process Clause is automatically violated when a state fails to pay a suspended employee without a pre-suspension hearing would elevate a suspended employee's wages above virtually all other property interests. There is no sound reason to do this. Wages are not intrinsically more important than various other property and liberty interests which can on occasion be taken away without a prior hearing; and the government interest in withholding wages is often compelling.

a. The temporary interruption of wages could be far less meaningful to a suspended employee than the fact of the suspension itself. The suspension from work can, in certain circumstances, have various adverse consequences. Yet such a deprivation has been upheld without prior hearings. *See, e.g.*, *Mallen*, 486 U.S. at 240-41; *Barchi*, 453 U.S. at 64-66. Indeed, the court below acknowledged that compelling state interests warranted respondent's immediate suspension and that such a suspension *with* pay would not have violated due process. Pet. App. 11a.

Furthermore, the private interest in receiving wages during a suspension is mitigated by the possibility of receiving backpay at a later date. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("the temporary loss of income, ultimately to be recovered, does not constitute irreparable injury"). Other interests whose summary deprivation this Court has upheld could not have been remedied so easily. For example, in *Dixon v. Love*, 431 U.S. 105, 113 (1977), the Court upheld the constitutionality of a state's revocation of a driver's license without a prior hearing even though it acknowledged that, "[u]nlike the social security recipients in *Eldridge*, who at least could obtain retroactive payments if their claims were subsequently sustained, a licensee is not made entirely whole if his suspension is later vacated." Similarly, in *Ingraham v. Wright*, 430 U.S. 651, 672-82 (1977), the Court upheld the infliction of corporal punishment without a prior hearing notwithstanding the difficulty in remedying an erroneous infliction.[1]

b. The notion underlying the position of respondent and the court below is that a state lacks a serious interest in the cost of paying suspended employees. This not only is incorrect as a factual matter, but also ignores this Court's express recognition in *Eldridge* that the "due process balance" must take into account "the expense of providing benefits to ineligible recipients pending decision." 424 U.S. at 347. As the Court there observed, "the fact that full benefits would continue until after such hearings would assure the exhaustion in most cases of this attractive option," and that "experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial." *Id.*

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[1] *See* Irene M. Rosenberg, *Ingraham v. Wright: The Supreme Court's Whipping Boy*, 78 Colum. L. Rev. 75, 91 (1978) ("Postponement of the hearing in the property context can often be viewed as compatible with the interest implicated, because the property, if wrongfully taken or withheld, can, at a later date, be fully restored. Where a liberty interest is invoked, the injured person is considerably less likely to be made whole by a belated award of damages.") (footnote omitted).

To assume that a government can easily absorb the wages of suspended employees ignores the tight budgets on which state and local governments and departments operate and the extent to which many of them are already understaffed. The difficulties to which governments would be placed under the court below's ruling can be demonstrated by the example of a police officer who has been found to be "on the take." If the police department were immediately to suspend the officer -- as public safety warrants -- they would have to pay him until later hearings are conducted. But the cost of paying his salary during the suspension would deprive the department of the funds needed to increase the other officers' hours or hire a replacement officer. This is truly a Hobson's choice: whether to keep a corrupt officer on the streets or have fewer officers on patrol. States have compelling interests in ensuring public safety and in cultivating and preserving confidence in public institutions. The rule proposed by the court below would, in some situations, seriously undermine those interests.

Requiring that all suspended employees be paid pending a hearing, however contemptible their behavior, would adversely affect the workplace in ways beyond mere dollars and cents. It takes little imagination to recognize that morale would be damaged when the employees who have acted within the bounds of the law not only see their malfeasant co-worker getting paid while doing no work, but also see their own workload increase or the quality of the office's services decline as a result. The taxpayers, too, would undoubtedly be outraged to learn that their tax dollars are going to workers who have been suspended for gross misconduct (and are possibly sitting in jail). This is particularly true where the suspension is based on an evidentiary finding of probable cause by a separate institution, as was the case here.

The states' compelling interests in maintaining flexibility to make personnel decisions, preserving morale among their employees and instilling public confidence in government institutions are illustrated by the following examples. In each case, suspension *with* pay would have been unnecessary and detrimental to the public interest.

- A District of Columbia police officer was suspended without pay following his arrest on sexual assault charges. The suspension was based upon a review of the arrest warrant and affidavits filed in support of the warrant application. The officer was later convicted of grabbing, assaulting and battering his victim. *District of Columbia v. Green*, No. 95-CV-1429 (D.C. Jan. 9, 1997).

- A Rhode Island police officer was convicted of three counts of first degree murder and one count of assault with intent to commit murder for methodically executing three young men at a garage while the victims were working on their cars. At the time of the murders, the officer was suspended without pay after being indicted for assault with a dangerous weapon upon one of the murder victims. *State v. Sabetta*, 680 A.2d 927 (R.I. 1996).

- A New Orleans police officer (Antoinette Franks) and an accomplice robbed a restaurant and shot and killed three people in the process, including another officer. After other police officers arrived at the scene to investigate the crime, Franks returned to the restaurant and pretended to investigate as well. As it turned out, a child had been hiding in the restaurant during the murders and had witnessed Franks' participation. Franks was arrested and suspended without pay, and later convicted and sentenced to death. *State v. Franks*, No. 375-992 (Orleans Parish Crim. Dist. Ct. 1995).

D. This Case Presents An Excellent Example Of The Rare Case When A State Should Be Permitted To Immediately Suspend An Employee Without Pay

Many of the factors which militate in favor of an immediate suspension without pay are present in this case. Had the court below properly weighed the *Eldridge* factors it would, we submit, have concluded that the state acted in a manner consistent with the Due Process Clause.

Respondent served as a police officer at East Stroudsburg University, a state university. Pet. App. 47a. On the morning of August 26, 1992, the Pennsylvania State Police arrested him on drug related felonies after finding him present in the home of a suspected drug dealer where five pounds of marijuana, scales and half-smoked marijuana cigarettes were present. *Id.* at 49a, 53a. The state police informed the university of respondent's arrest that afternoon; the university immediately suspended him. *Id.* at 49a-50a. As the Third Circuit found, "Homar's arrest on drug charges certainly suffices to ensure that the university's concerns were not baseless or unwarranted, as required by the Supreme Court." *Id.* at 11a (citing *Mallen*, 486 U.S. at 240). Indeed, police may only arrest a person if there is probable cause to believe he committed the charged offense. *Gerstein v. Pugh*, 420 U.S. 103, 111-14 (1975).

The benefit to respondent of additional procedures would have been minimal. Formal notice of the proposed action was unnecessary because respondent was aware of the reason for the suspension, and in fact asked his superior if he was suspended during his phone conversation the day after the arrest. *Id.* at 50a. Moreover, the fact of his association with a known drug dealer was never questioned.

Weighed against this low risk of erroneous deprivation is the state's paramount interest in the conduct of its police officers. Respondent's misconduct raised particularly serious concerns. With drug use among our nation's youth increasing, the specter of a university police officer participating in illegal drug activities is deeply troubling. To hold that such an officer is entitled to receive his salary after his arrest for such activities sends out precisely the wrong message to the remainder of the police force and the community, and interferes with ongoing law enforcement efforts.

Finally, less than a month after his suspension, respondent received a hearing and was notified that he would receive backpay at the rate of his new position, groundskeeper.[2] Pet. App. 55a. The possibility of obtaining some level of back pay existed from the outset, as it always does when wages are withheld, and lessened the private interest in additional procedures. In sum, the risk of erroneous deprivation was small; the governmental interest in suspending respondent without pay was significant; and backpay reduced the private interest. Taken together, the balance weighs in the government's favor -- the Constitution did not require that respondent be paid during his suspension.

---

[2] Following further meetings with respondent's union representatives, petitioners later agreed to give respondent back wages at his original police officer salary. Pet. App. 55a-56a.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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February 10, 1997

(8)

Supreme Court, U.S.
FILED
MAR 3 1997
CLERK

No. 96-651

IN THE
Supreme Court of the United States
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On Writ of Certiorari to the
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for the Third Circuit

BRIEF FOR AMICUS NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the due process clause requires that a tenured public employee receive notice and an opportunity to respond prior to being indefinitely suspended without pay solely on the basis of his arrest?

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IN THE

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for the Third Circuit

BRIEF FOR AMICUS NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS*[1]

Amicus, the National Treasury Employees Union (NTEU), is a federal sector labor organization that is the exclusive collective bargaining representative of approximately 150,000 employees of the federal government nationwide. NTEU and the employees it represents have a vital interest in the resolution of the issue presented in this case—whether the due process clause requires that a tenured public employee receive some kind of hearing prior to being indefinitely suspended without pay solely on the basis of his arrest.

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[1] The parties have consented to the filing of this brief and their letters of consent have been lodged with the Clerk of this Court.

In the federal sector, except in cases involving the national security, tenured employees are guaranteed notice and an opportunity to respond in every instance before they are indefinitely suspended without pay. 5 U.S.C. 7503; 7513(b); 7532.[2] These guarantees do not interfere with the government's legitimate interests, for federal law specifies that—"[w]hen the circumstances require that the employee be kept away from the worksite"—the employee may be placed in a non-duty status, with pay, for as long as is necessary to effect the action. 5 C.F.R. 752.404 (d)(1) (1996). As we show below, the procedures provided in the federal sector strike the proper balance between the competing public and private interests under this Court's due process clause jurisprudence.

SUMMARY OF ARGUMENT

The due process clause generally requires that—notwithstanding an arrest—tenured public employees who are suspended indefinitely must receive notice and an opportunity to respond before they are deprived of pay. Affirmance of the court of appeals' decision is consistent with this Court's precedent, which recognizes a strong presumption in favor of pre-deprivation hearings, and requires a showing of exigency to overcome that presumption.

A. As this Court has repeatedly held, the "root requirement" of the due process clause is " 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.' " *Cleveland*

---

[2] Pursuant to 5 U.S.C. 7513(b), where an agency proposes to suspend an employee for more than 14 days, it must provide 30 days advance written notice, a reasonable time (not less than 7 days) for the employee to answer orally and in writing, and a written decision with specific reasons, at the earliest practicable date. Where there exists "reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed," the notice period may be reduced (5 U.S.C. 7513 (b)(1)), but the other requirements still apply. Suspensions for 14 days or less must also be preceded by notice, a reasonable time to answer orally and in writing, and a written decision. 5 U.S.C. 7503(b).

Board of Education v. Loudermill, 470 U.S. 532, 542 (1985) (quoting *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971) (original emphasis)). The Court "tolerate[s] some exceptions to the general rule requiring predeprivation notice and hearing, but only in 'extraordinary situations where some valid governmental interest is at stake. . . .'" *United States v. James Daniel Good Real Property,* 510 U.S. 43, 114 S. Ct. 492, 501 (1993) (quoting *Boddie,* 401 U.S. at 379).

Contrary to the arguments of the petitioners and their *amici,* including the United States, neither *FDIC v. Mallen,* 486 U.S. 230 (1988), nor *Barry v. Barchi,* 443 U.S. 55 (1979), suggests a retreat by this Court from these principles. At issue in *Barchi* was a horse trainer's entitlement to a pre-suspension *evidentiary* hearing. In fact, as this Court subsequently noted in *Loudermill* (470 U.S. at 542), *Barchi* recognized "the need for some form of pretermination hearing"; Barchi himself had been "given more than one opportunity to present his side of the story." 443 U.S. at 65.

In *FDIC v. Mallen,* which ruled constitutional a statute that authorizes the Federal Deposit Insurance Corporation to suspend summarily an indicted officer of a federally insured bank, the bank officer did not contend that he was entitled to any kind of pre-suspension hearing. 486 U.S. at 240. While the Court chose, nonetheless, to address the issue, its conclusion is entirely consistent with the well-established principles just described.

Thus, the overriding public interest in ensuring public confidence in the banking industry was historic and congressionally recognized. As the Court's decision further emphasized, that compelling governmental interest was "coupled with" the fact of a bank officer's indictment. *Id.* at 241. The indictment represented a probable cause determination by an independent body which would reduce the risk of an erroneous deprivation.

Further, in *Mallen,* the statute did not require that the bank officer be denied pay during the period of his suspension. The determination whether to pay the officer was within the bank's discretion.

B. The court of appeals correctly applied the factors set forth in *Mathews v. Eldridge,* 424 U.S. 319 (1976), when it held that—notwithstanding an arrest—a tenured employee who is indefinitely suspended is entitled to notice and an opportunity to respond, prior to suffering a loss in pay.

1. Indefinite suspensions without pay are serious deprivations of property. The Court has "frequently recognized the severity of depriving a person of the means of livelihood." *Loudermill*, 470 U.S. at 543 (citations omitted). An employee who is indefinitely suspended may be without a paycheck for weeks or months. He has no predictable source of income and cannot make financial plans. Because he is under a cloud of suspicion, it may be difficult, if not impossible, to find other, temporary employment. Further, he suffers resulting intangible harms, including loss of self-esteem and embarrassment, while he is awaiting the conclusion of the investigation and a decision whether his suspension will be lifted.

2. The second factor examined under *Mathews*—the value of additional procedures in avoiding an erroneous deprivation—also supports the provision of a hearing to tenured employees before they are indefinitely suspended. Providing an employee the opportunity to present his side of the story is "recurringly of obvious value in reaching an accurate decision." *Loudermill*, 470 U.S. at 543. In this case, for example, the University did not have the benefit of Homar's explanation of his innocent presence at the site of the drug raid, or his version of what he told the officers who arrested him.

There is no merit to the argument of petitioners and their *amici* that the likelihood of error absent a hearing is reduced significantly by the fact of an employee's warrantless arrest. As analogous precedent demonstrates, a mere arrest by a police officer does not give rise to reasonable grounds to believe that an individual has committed a crime. Accordingly, it does not provide sufficient assurances against error to lessen the need for pre-deprivation process.

3. Petitioners failed to articulate, much less demonstrate, that a governmental interest adequate to justify summary suspension without pay is at stake when an employee is arrested. As *amicus* United States recognizes (Br. 24), "interests in law enforcement integrity and public safety . . . address the suitability of Homar remaining in a duty status but . . . do not concern the appropriateness of his being suspended *without pay*." (Emphasis added.)

In fact, suspending an employee with pay is the very solution that this Court suggested in *Loudermill* for removing a potentially hazardous individual from the worksite until a pre-deprivation hearing can be afforded. Because the government has such a less restrictive measure available to protect its interests, it cannot establish the kind of extraordinary circumstances required to justify a summary suspension.

C. Contrary to the contentions of the United States, an affirmance of the decision below will have no impact upon the provisions of the federal statutes that concern the rights of probationary employees. Such employees lack a property interest in their jobs because they may be terminated at will. Any due process requirement this Court may derive will, therefore, not apply to non-tenured, probationary employees of the federal government.

Nor would affirmance of the court of appeals decision cast doubt upon the constitutionality of 5 U.S.C. 7532, which authorizes the heads of certain federal agencies to suspend employees summarily and without pay, in highly limited circumstances, when the interests of national security so require. The justification for that provision—the "extraordinary" circumstances warranting departure from the normal requirements of due process—lies in the vital governmental need to protect the national security.

Indeed, in the national security context, meaningful predeprivation hearings may be impractical because they might require disclosure of confidential information and sources to an individual suspected of treason.

ARGUMENT

I. THIS COURT HAS CONSISTENTLY HELD THAT —EXCEPT IN TRULY EXTRAORDINARY CIRCUMSTANCES—THE DUE PROCESS CLAUSE REQUIRES NOTICE AND AN OPPORTUNITY TO RESPOND BEFORE AN INDIVIDUAL IS DEPRIVED OF A SIGNIFICANT PROPERTY INTEREST

Petitioners and their *amici* center their criticism of the court of appeals decision upon its supposed creation of what they call a "per se" rule, requiring a predeprivation hearing before any suspension, in every case. In resolving this case, however, the Court need not determine whether such a "per se" rule is appropriate. Instead, the Court should affirm the decision below on the narrower grounds that—notwithstanding an arrest—the due process clause generally requires that tenured public employees who are suspended indefinitely must receive notice and an opportunity to respond before they are deprived of pay.

The establishment of such a general rule would allow for exceptions in cases that involve, for example, the national security. Further, the general rule we urge is entirely consistent with this Court's precedent, including the oft-stated principle that due process is a "flexible" concept. The arguments to the contrary by petitioners and their *amici*, including the United States, are meritless.

A. The "Root Requirement" of the Due Process Clause Is That an Individual Is Entitled to a Hearing *Before* Being Deprived of a Significant Property Interest

1. As this Court has repeatedly observed, an "essential principle" or "root requirement" of the due process clause

is "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 542 (1985) (quoting *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971) (original emphasis)). Thus, while "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause . . . there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950); *see also United States v. James Daniel Good Real Property,* 510 U.S. 43, 114 S. Ct. 492, 498, 500 (1993); *Goss v. Lopez,* 419 U.S. 565, 579 (1975); *Fuentes v. Shevin,* 407 U.S. 67, 82 (1972); *Board of Regents v. Roth,* 408 U.S. 564, 569-570 n.7 (1972); *Bell v. Burson,* 402 U.S. 535, 542 (1971); *Sniadach v. Family Finance Corporation,* 395 U.S. 337, 343 (1969) (Harlan, J., concurring); Friendly, *Some Kind of Hearing,* 123 U. Pa. L. Rev. 1267, 1281 (1975) (prior opportunity to respond is "fundamental" element of due process).

As this Court recently reaffirmed, the purpose of requiring a pre-deprivation hearing "'is not only to ensure abstract fair play to the individual.'" *James Daniel Good Real Property,* 114 S. Ct. at 500-01 (quoting *Fuentes,* 407 U.S. at 80-81). "'Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property. . . .'" *Id.*

"The requirement of notice and an opportunity to be heard," this Court has explained, "raises no impenetrable barrier to the taking of a person's [property]." *Fuentes,* 407 U.S. at 81. Instead, "the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented." *Id.*

These essential principles are central to our form of government. As Justice Frankfurter eloquently observed in *Joint Anti-Fascist Refugee Committee v. McGrath,*

> The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

341 U.S. 123, 170 (1951) (Frankfurter, J., concurring).[3]

B. Exceptions to the General Rule Requiring a Pre-Deprivation Hearing Are Tolerated Only in Truly Unusual or Extraordinary Situations

1. As we have shown, this Court's decisions have been clear that a pre-deprivation hearing is a fundamental and presumptive requirement of the due process clause. While the Court will "tolerate some exceptions to the general rule requiring predeprivation notice and hearing," it will do so "only in 'extraordinary situations where some valid governmental interest is at stake. . . .' " *James Daniel Good Real Property,* 114 S. Ct. at 501 (quoting *Boddie,* 401 U.S. at 379); *see also Fuentes,* 407 U.S. at 90-91 (postponement of hearing may be justified in "truly unusual" and "extraordinary situations" where there is "a

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[3] Justice Frankfurter further noted:

> The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

341 U.S. at 171-72.

special need for very prompt action"); *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 300 (1981) (summary administrative action justified in "emergency situations").

Thus, for example, the Court has not required a hearing prior to emergency action required by the exigencies of war, *Bowles v. Willingham*, 321 U.S. 503, 521 (1944), or bank failure, *Fahey v. Mallonee*, 332 U.S. 245 (1947). Exigent circumstances have been found where immediate action was necessary to protect consumers from contaminated food, *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908), or misbranded drugs, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950). Summary administrative procedures have also been upheld to prevent an " 'imminent danger to the health and safety of the public' " arising out of strip mining. *Hodel*, 452 U.S. at 301 (quoting 30 U.S.C. 1291(8) (1976 ed., Supp. III)).

2. This Court has often observed, as petitioners and their *amici* emphasize, that due process is a "flexible" concept, and that " 'not all situations calling for procedural safeguards call for the same kind of procedure.' " Brief for the United States at 14 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). As the foregoing discussion demonstrates, however, the principle of "flexibility" does not undermine the equally well-established presumption in favor of some kind of pre-deprivation hearing.

The principle of "flexibility" is most pertinent to a determination of the kind of hearing that will be required, as opposed to its timing. As this Court explained in *Fuentes*, 407 U.S. at 82, "the Court has held that due process tolerates variances in the *form* of a hearing . . .," but it "has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes place" (original emphasis).

Further, the principle of "flexibility" does not prevent the establishment of general rules to cover particular categories of cases. *Loudermill* itself established a general rule requiring a pre-deprivation hearing in cases where tenured public employees are terminated. There is no reason a similar general rule should not be established with respect to indefinite suspensions.

C. *FDIC v. Mallen* and *Barry v. Barchi* Do Not Establish a Lower Burden of Justification for Summary Suspensions

In its brief, the United States ultimately pays lip service to *Loudermill*'s reconfirmation of the " 'root requirement' of the Due Process Clause"—requiring that an individual be given an opportunity for a hearing "*before* being deprived of a significant property interest." Brief for the United States at 23 (quoting *Loudermill,* 470 U.S. at 542 (original emphasis)). Yet, at the same time, it contends that—so long as adequate post-deprivation procedures are available—no hearing of any kind is required prior to the indefinite suspension of a government employee where government's interest is what the United States calls "weighty." *Id.* at 14. It purports to rely upon *FDIC v. Mallen*, 486 U.S. 230 (1988), and *Barry v. Barchi,* 443 U.S. 55 (1979), to support its position.

The effort of the United States to transform into a sweeping rule the limited exception to the "root requirement" of due process finds no support in *Mallen* or *Barchi.* Neither decision suggests a retreat by this Court from its long-standing recognition that a pre-deprivation hearing is required by the due process clause, except in truly extraordinary circumstances.

1. In *Barchi* (a pre-*Loudermill* case), a race horse trainer challenged the procedures under which his license was suspended. Under state law, when a post-race test of a horse revealed the presence of drugs, it was presumed that the trainer was responsible (either by intentionally administering the drug, or through negligence). The statute provided for an immediate suspension of a trainer's license, following a positive test. It also provided for

a post-suspension hearing, but gave no time limit for the holding of a hearing.

Barchi argued that under the due process clause he was entitled to a pre-suspension *evidentiary* hearing. The Court rejected *that* proposition. 443 U.S. at 64. It concluded that the state had an overriding interest in ensuring the integrity of the horse racing industry that would justify the imposition of an interim suspension, pending a prompt administrative or judicial hearing. *Id.*

Barchi, like *Mathews v. Eldridge*, 424 U.S. 319 (1976), thus involved the question whether a full evidentiary hearing was required prior to the governmental deprivation at issue. *Barchi* did not uphold the right of the state authorities to suspend a trainer's license with no pre-deprivation process at all.

On the contrary, as this Court noted in *Loudermill* (470 U.S. at 542), *Barchi* is one of this Court's many decisions that recognize "the need for some form of pretermination hearing." The *Barchi* Court explicitly noted that "although Barchi was not given a formal hearing prior to the suspension of his license, he was immediately notified of the alleged drugging, 16 days elapsed prior to the imposition of the suspension, and he was given more than one opportunity to present his side of the story. . . ." 443 U.S. at 65.

2. In *FDIC v. Mallen*, the other case so heavily relied upon by petitioners and their *amici*, including the United States, this Court upheld the constitutionality of a statute that permits the Federal Deposit Insurance Corporation to suspend an indicted officer of a federally insured bank. The statute did not provide any pre-suspension process, but instead required the FDIC to hold a hearing within 30 days of a request by the bank officer, and to issue a decision no more than 60 days after the hearing.

a. The actual issue in *Mallen* was whether the post-suspension hearing was sufficiently prompt to satisfy due process. As this Court's opinion states, the bank officer did not contend that he was entitled to an opportunity for any kind of hearing before the suspension went into effect. 486 U.S. at 240.

To be sure, this Court went on to discuss, in *dicta*, the process to which the bank officer might be entitled before the imposition of the suspension. But the nature of the Court's discussion suggests that it was addressed to whether Mallen could have argued for an elaborate hearing prior to his suspension (as did the horse trainer in *Barchi*).

Thus, the Court extensively analogized Mallen's case to that of Barchi. It went on to reject the need for pre-deprivation process in *Mallen* for the same reasons it had rejected the need for a full evidentiary hearing prior to the deprivation in *Barchi*. 486 U.S. at 241-42.

As previously described, *Loudermill* relied upon *Barchi* for the proposition that the due process clause requires some kind of pre-deprivation process short of a full evidentiary hearing. 470 U.S. at 542. It would be directly contrary to *Loudermill* for the *Mallen* Court to have cited *Barchi* for the opposite proposition—that the bank president was entitled to no pre-deprivation process of any kind. *Loudermill*, *Mallen*, and *Barchi* can only be harmonized by reading the *Mallen dicta* as responding to any suggestion that a full evidentiary hearing could be required prior to the suspension.

b. In any event, even if the *Mallen dicta* were addressed to the bank officer's right to any kind of pre-deprivation process at all, the *Mallen* case represents the kind of extraordinary situation that would justify a summary suspension under the principles we have described. Thus, in *Mallen* this Court gave deference to congressional findings that "prompt suspension of indicated bank officers may be necessary to protect the interests of depositors and to maintain public confidence in our banking institutions." 486 U.S. at 241.

Because of its extreme sensitivity, banking has been "one of the longest regulated and most closely supervised of public callings." *Fahey v. Mallonee*, 332 U.S. 245, 250

(1947). The entire federal deposit insurance system was created because, "[f]aced with virtual panic, Congress attempted to safeguard the hard earnings of individuals against the possibility that bank failures would deprive them of their savings." *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 432 (1986). Congress gave the FDIC the summary suspension power in the context of its repeated findings of a powerful correlation between bank officer fraud and abuse and commercial bank failures. *E.g.* H.R. Rep. 95-1383, 95th Cong., 2d Sess. 10 (1978); H.R. Rep. 98-1137, 98th Cong., 2d Sess. 7 (1984).

It was only when this historical and congressionally mandated interest in maintaining confidence in the banking industry was "coupled with factors minimizing the risk of an erroneous deprivation" (*Mallen*, 486 U.S. at 243) that the Court found the existence of the extraordinary circumstances required to permit a summary deprivation of property. Specifically, the suspension of bank officers is based upon the determination by an independent body (a grand jury) that there was probable cause to believe that the officer had committed a felony.

Further, unlike the governmental interests at stake in this case, those at issue in *Mallen* could not be satisfied in any way short of imposing a summary suspension, without pay. The fact that the government is the employer here distinguishes this case from *Mallen*. The government can meet an interest in removing its own employees from the worksite without depriving them of pay because the decision whether to afford them pay is within its discretion. In *Mallen*, the government could only meet its interests in removing the indicted bank officer from his post by requiring the bank to suspend him. The government did not mandate that he not be paid; that decision belonged to the bank.

In short, *Mallen* does not stand for the proposition that a mere "weighty" government interest will suffice to authorize departure from the fundamental requirement of a pre-deprivation hearing. *Mallen* is, instead, consistent with this Court's recognition both before and after that case (*see James Daniel Good Real Property*, 114 S. Ct. at 501), that only extraordinary circumstances justify the deprivation of property without some kind of prior process. As we now show, the indefinite suspension of a tenured public employee, based upon his arrest, does not present extraordinary circumstances justifying the lack of pre-deprivation procedures.

II. THE ARREST OF AN EMPLOYEE DOES NOT PROVIDE AN EXTRAORDINARY CIRCUMSTANCE JUSTIFYING A SUMMARY SUSPENSION WITHOUT PAY

The petitioners and their *amici* contend that an employee's arrest provides a sufficient justification for departing from the "root requirement" of the due process clause, and for permitting a public employer to summarily suspend him, without pay. The strength of their contention is measured by application of the three factors this Court set forth in *Mathews v. Eldridge*: 1) the private interests affected by the indefinite suspension; 2) the risk of the erroneous deprivation of those interests through the procedures used; and 3) the governmental interests at stake, including the fiscal and administrative burdens that would be presented by additional procedures. 424 U.S. at 335.

As we now show, the *Mathews* analysis confirms that—notwithstanding an arrest—a tenured employee who is indefinitely suspended is entitled to notice and an opportunity to respond, prior to suffering a loss in pay. Categorically, indefinite suspensions without pay are serious deprivations of property. Further, providing an employee with an opportunity to respond would assist the public employer in making the correct decision as to whether that deprivation is warranted. Finally, as *Loudermill* recognized, the government's important interests in removing a potentially dangerous employee from the worksite can be met by suspending the employee with pay.

Accordingly, an employee's arrest does not provide the extraordinary circumstances required to depart from the "root requirement" of the due process clause, mandating a pre-deprivation hearing. This Court should affirm the court of appeals decision to the extent that it so held.

A. An Indefinite Suspension Without Pay Is a Serious Deprivation of Property

1. As this Court observed in *Loudermill,* "the significance of the private interest in retaining employment cannot be gainsaid." 470 U.S. at 543. The Court has "frequently recognized the severity of depriving a person of the means of livelihood." *Id.* (citations omitted). An employee who is indefinitely suspended can go for weeks or months without a means of livelihood. His financial circumstances are completely uncertain.

Contrary to the suggestions of petitioners (Pet. Br. 19) and the United States (Br. 18, 20), the interests of an employee who is indefinitely suspended without pay are no less weighty than those of an employee who is terminated. By definition, such an employee has no way of knowing how long he will be deprived of his livelihood. He cannot really look for another job, because he is uncertain whether and when he will be reinstated to his current job. And with no knowledge of when (if ever) he will be reinstated, he cannot make any financial plans or commitments. Any search for temporary work, moreover, will be burdened by the uncertainty of his employment status.

In fact, a public employee who is indefinitely suspended, pending further investigation, has much in common with one who is "temporarily discharged" pending a hearing, as were the employees in *Loudermill. See Brock v. Roadway Express,* 481 U.S. 252, 264 (1987) (plurality opinion) (characterizing proposed termination in *Loudermill* as a "temporary discharge"). The Court's observation in *Loudermill*—that "while a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job" (470 U.S. at 543)—is equally applicable to an indefinite suspension.

The suggestion of the United States that such a suspension "reflects less seriously on the employee's reputation than does a termination for cause" (U.S. Br. 18) is clearly incorrect. An employee who is suspended indefinitely while he is being investigated is under à cloud of open-ended suspicion. The worst suspicions of a prospective employer, not to mention the employee's colleagues, friends, and neighbors, can be assumed true.

There is similarly no merit to petitioners' argument that what is a stake here is merely "the interest in receiving an uninterrupted paycheck," an interest alleged by petitioners to be of relatively little significance because "the deprivation was temporary, the period without any paycheck of brief duration, and the loss—money—easily replaceable." Pet. Br. 19. Depriving an employee of even part of his wages "may as a practical matter drive a wage-earning family to the wall." *Sniadach,* 395 U.S. at 341-42. As Justice Marshall explained in *Arnett v. Kennedy,* "[many] workers, particularly those at the bottom of the pay scale, will suffer severe and painful economic dislocations from even a temporary loss of wages. . . . [T]he loss of income for even a few weeks may well impair their ability to provide the essentials of life—to buy food, meet mortgage or rent payments, or procure medical services." 416 U.S. 134, 220-221 (1974) (dissenting opinion).[4]

Combined with these tangible injuries, there are the obvious intangible harms—loss of self-esteem, embarrassment, and a sense of helplessness. As Justice Marshall suggested in *Loudermill,* these injuries cannot ever be compensated by a subsequent award of money. *Loudermill,* 470 U.S. at 550 (concurring opinion).

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[4] Even if the suspension ultimately lasts for a relatively short period, there is no way of knowing that at its outset. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Fuentes,* 407 U.S. at 82 (quoting *Stanley v. Illinois,* 405 U.S. 645, 647 (1972)).

This Court has recognized that one of the "central concerns of procedural due process" is "the promotion of participation and dialogue by affected individuals in the decisionmaking process." *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242 (1980). That concern is frustrated where an employee is summarily and indefinitely suspended, solely on the basis of an arrest. Leaving an employee in a state of financial limbo and denying him an opportunity to seek redress clearly run counter to "both the appearance and reality of fairness," conditions which " 'generat[e] the feeling, so important to a popular government, that justice has been done.' " *Id.* (quoting *Joint Anti-Fascist Committee,* 341 U.S. at 172 (Frankfurter, J., concurring)).

B. Allowing the Employee an Opportunity To Respond Would Be of Value in Reaching an Accurate and Appropriate Decision

1. The second factor examined under *Mathews* is the value of additional procedures in avoiding an erroneous deprivation. 424 U.S. at 335. Erroneous deprivations can occur, of course, even when decision makers are acting "in the utmost good faith." *Goss v. Lopez,* 419 U.S. at 580. Decision makers "frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed." *Id.* "The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference. . . ." *Id.* at 580.

In *Loudermill,* this Court found that providing an employee the opportunity to present his side of the story before he is terminated is "recurringly of obvious value in reaching an accurate decision." 470 U.S. at 543. As the Court observed, "dismissals for cause will often involve factual disputes." *Id.* Moreover, "[e]ven when the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decision maker is likely to be before the termination takes effect." *Id.*

2. These considerations are present when a decision is being made about what action to take against an employee on the basis of an arrest. In this case, for example, the decision maker lacked the benefit of Homar's explanation of his innocent presence at the scene of the police raid. *Cf. Lopez,* 419 U.S. at 580, n.9 (student suspended on the basis of arrest at demonstration should have been allowed to explain her presence among those arrested to principal before imposition of suspension). Homar did not have a chance to provide his side of the story regarding statements he did or did not make to the police. Further, Homar had no opportunity to invoke the discretion of the University to continue to pay him while its investigation was proceeding or to reassign him to another position.

Whether Homar would have been able to convince the decision maker that he was innocent, or that something less than a suspension without pay was warranted, is not a relevant factor. "The right to a hearing does not depend on a demonstration of certain success." *Loudermill,* 470 U.S. at 544 (quoting *Carey v. Piphus,* 435 U.S. 247, 266 (1978)).

3. There is no merit to the arguments of the petitioners and their *amici* that an arrest of an employee provides sufficient assurances against error to lessen the need for pre-deprivation process. In this case, for example, the charges against Homar were dropped at the preliminary hearing within days after the arrest, a result entirely consistent with his contentions that he just happened to be in the wrong place at the wrong time.

A warrantless arrest by a police officer of an individual who happens to be at the site of the execution of a search warrant does not provide even reasonable grounds to believe that the individual has, in fact, committed a crime. *See Dunnington v. Department of Justice,* 956 F.2d 1151, 1157 (Fed. Cir. 1992) (observing that "it is generally agreed that an arrest by police authorities does not, by itself, provide reasonable cause to believe that an employee has committed a crime for which imprisonment could result"). Indeed, this Court observed in *Schware v. Board of Bar Examiners of the State of New Mexico,*

> The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of the offense.

353 U.S. 232, 241 (1957).[5]

Further, " '[z]eal in tracking down crime is not in itself an assurance of soberness of judgment'." *Gerstein v. Pugh,* 420 U.S. 103, 118 (1975) (quoting *McNabb v. United States,* 318 U.S. 332, 343 (1943)). For that reason, this Court has required that any significant restraint on liberty following an arrest must be based upon an independent determination of probable cause. *Gerstein,* 420 U.S. at 125. No less should be required to indefinitely deprive an individual of his livelihood.[6]

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[5] Even had there been a warrant issued, such an *ex parte* review of probable cause has been held not to establish reasonable grounds to believe an employee has committed a crime. *Dunnington,* 956 F.2d at 1157 (even where arrest warrant issued, federal agency should not undertake summary suspension of employee without further investigation); *cf. James Daniel Good Real Property,* 114 S. Ct. at 502 (*ex parte* proceeding before magistrate provides inadequate protection against erroneous seizure of property).

[6] An individual's arrest cannot be equated to a grand jury indictment. As this Court observed in *Mallen,* "[t]he returning of the indictment establishes that an independent body has determined that there is probable cause to believe that the officer has committed a crime. . . ." 486 U.S. at 244. *See also Gerstein,* 420 U.S. at 118, n.19.

Indeed, the fact of an arrest lacks even the probative value of the expert's affirmance in *Barchi* that the trainer's horse had been drugged. The expert's opinion, as this Court noted (443 U.S. at 65), was based upon objective scientific evidence. An on-the-scene arrest by a police officer is frequently based upon his subjective impressions.

4. In their brief on the merits, the petitioners argue that University officials were required by law to suspend Homar without pay upon his arrest, so that no purpose would have been served by a pre-suspension hearing. They rely upon section 7.173 of Title 4 of the Pennsylvania Code, which provides that:

> As soon as practicable after an employe has been formally charged with criminal conduct related to his employment with the Commonwealth or which constitutes a felony, the employe shall be suspended without pay. If the charge results in conviction in a court of law, the employe shall be terminated.

Section 7.172 states that "an employe shall be deemed to be formally charged with criminal conduct when he has been arrested . . . ."

These provisions—which are taken from "the Governor's Code of Conduct"—were never relied upon or even cited previously by the Commonwealth and, therefore, need not even be considered by this Court. *See Loudermill*, 470 U.S. at 539, n.5 (rejecting state's contention that employee lacked property interest in part because it was not raised below). Further, the provisions the University is now citing are not statutory; the Code is an executive order that has been codified as part of the Pennsylvania Code, and it lacks the force and effect of law. *State Correctional Institution at Graterford, Department of Corrections v. Brumfield*, 594 A.2d 852, 856 (Pa. 1991).

Further, petitioners' new position—that the provision required the University to immediately suspend Homar without a hearing—does not comport with the record in this case. Petitioner Levanowitz testified that, while he was "guided" by unspecified provisions of the Governor's Code, he made the decision to suspend Homar without pay on his own, after consulting with labor relations specialists.[7]

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[7] In his deposition, Levanowitz testified that he referred to an employee handbook, language in the collective bargaining agree-

Petitioner's new-found reliance upon the Governor's Code is also unconvincing given that the suspension of Homar went on for weeks after the charges against him were dismissed. If the suspension were based upon the fact of arrest alone, then no justification for it remained after the charges were dismissed.

Petitioners' resort to the Governor's Code is also not supported by the language of the provision. It states that a suspension should be imposed "as soon as practicable" after an arrest. 4 Pa. Code § 7.173. The employer thus retains the discretion to afford an employee a prior opportunity to show that the arrest was improper, that the underlying charges were unfounded, or that the suspension without pay was otherwise unwarranted.

In fact, if the Code were interpreted to deprive an employer of this discretion, it would likely violate due process. A tenured employee, such as Homar, may only be suspended or disciplined for just cause. By definition, an improper arrest would not supply just cause for discipline. Just cause ultimately requires a finding of guilt. If the mere fact of an arrest can justify failing to provide any hearing, then the employee is denied an opportunity to disprove an element essential to the just cause determination—that he actually committed the offense with which he has been charged. *See Bell v. Burson*, 402 U.S. at

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ment, labor relations journals, and the like in making suspension decisions. Ct. App. J.A. at 127-128. He mentioned the "Governor's Codes of Conduct," as a "Commonwealth" (as opposed to "University") policy regarding suspensions. *Id.* at 128. Levanowitz was specifically asked if he was "obliged" to follow the Code in suspending an employee. *Id.* at 129. He responded that "I guess, I'm not sure that I would choose the word obliged, but I did refer to this and let it guide my actions somewhat in this case, yes." *Id.* He subsequently testified that he had consulted the Code of Conduct and received advice from "Labor Relations people" in the "Chancellor's office" when deciding whether to suspend Homar. *Id.* at 137. He stated that the "Labor Relations people" "concurred with my feeling that I had already arrived at, was that we should suspend." *Id.* at 137-138. He did not recall, however, whether they had discussed suspension with or without pay. *Id.*

541-542 (state may not summarily suspend license of uninsured driver who fails to post bond based solely on fact of accident; driver is entitled to pre-suspension hearing regarding fault).[8]

In any event, even if petitioners' interpretation of the Code's requirements were correct, their argument is classic bootstrapping. The petitioners are using the employer's own unilaterally imposed policy of summary suspension to define what process is due. They would have the Court hold that—if the public employer (in this case, the Governor) decides to summarily suspend on the basis of an arrest—then the due process clause requires no more. That is analogous to the approach that this Court found wanting in *Loudermill*, when it rejected the state's argument that a property right "is defined by and conditioned on, the legislature's choice of procedures for its deprivation." 470 U.S. at 539. *See also Vitek v. Jones*, 445 U.S. 480, 490-91 (1980).

C. The Government's Interests Do Not Require Suspension Without Pay

1. The final factor in the analysis is the governmental interests at stake, including the function involved and the fiscal and administrative burdens of additional or different procedures. *Mathews*, 424 U.S. at 335. The governmental interests articulated by petitioners to support sum-

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[8] In *Dixon v. Love*, 431 U.S. 105 (1977), the Court upheld a state statute that provided for the summary revocation of the drivers' licenses of persons who were repeatedly convicted of traffic violations. The Court found that a pre-revocation hearing would be of little use because suspension and revocation decisions under the statute were largely automatic. 431 U.S. at 113. Significantly, in *Dixon*, unlike *Burson* (and unlike this case), the individuals subjected to the deprivation had already had an opportunity for a hearing on the question of their culpability. The Court specifically noted that the convicted traffic offenders had the opportunity to obtain full judicial hearings in connection with the traffic convictions that formed the basis for their suspension. *Id.* The result in *Dixon* surely would have been different had the statute provided for the summary suspension of drivers' licenses based upon mere arrest for traffic violations.

mary suspension without pay include the preservation of public confidence in the campus police force, ensuring effective law enforcement, and maintaining the morale of fellow officers. Pet. Br. 22.

As *amicus* United States recognizes (Br. 24), "interests in law enforcement integrity and public safety . . . address the suitability of Homar remaining in a duty status but . . . do not concern the appropriateness of his being suspended *without pay*" (emphasis added). These articulated interests clearly could have been satisfied by suspending Homar with pay, until such time as a limited *Loudermill*-type hearing were held. That is precisely the practice in the federal sector where, by statute and regulation, tenured employees are kept in a pay status for a sufficient amount of time to provide them with an opportunity to respond, orally or in writing, to the charges against them; the only exception is for cases involving national security. *See supra,* page 2, n.2.

Further, suspending an employee with pay is the very solution that this Court suggested in *Loudermill,* when it rejected the argument that the government might have an overriding interest in terminating an employee without any prior process in cases where the employer "perceives a significant hazard in keeping the employee on the job." 470 U.S. at 544-545. The *Loudermill* Court specifically observed that, in such cases, a public employer can avoid "the problem" of having to keep the employee on the job, by suspending him *with* pay. *Id.*

The Court's specification that the suspension be *with* pay was not inadvertent or meaningless. It obviously suggests, as the court of appeals recognized, that a summary suspension without pay would raise constitutional concerns.

In any event, while petitioners and their *amici* are correct that *Loudermill* did not hold that a public employer must provide pay to any employee that it summarily suspends, the court of appeals did not rely upon the passage at issue for that purpose, nor do we. Instead, it cited the passage to illustrate this Court's conclusion that the government's interests in safety, public confidence, and the like, can be met without denying employees a pre-deprivation hearing by suspending them with pay.

In this case, the governmental interest to be weighed is not the interest in suspending an employee to ensure safety, public confidence, and effective law enforcement. Rather, it is the specific interest in suspending an employee *without* pay to meet those goals. *See James Daniel Good Real Property*, 114 S. Ct. at 502. Because the government has "less restrictive measures" available to protect its goals (*e.g.*, suspension with pay), it cannot establish the kind of "exigent circumstances" necessary to justify a summary suspension. *Id.* at 505; *see also Sniadach*, 395 U.S. at 339 (state salary garnishment statute constitutionally defective because it is not narrowly drawn to meet unusual government interest).

2. Further, "affording the employee an opportunity to respond prior to [an indefinite suspension without pay] would impose neither a significant administrative burden nor intolerable delays." *Loudermill*, 470 U.S. at 544. The kind of hearing described in *Loudermill* is not an elaborate or time-consuming one; it merely requires that an employee receive "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546. In the federal sector, such hearings are routinely held within a week of the initial suspension; it is not inconceivable that a shorter period could be reasonable, depending upon the circumstances.

The *amici* States argue that requiring them to pay suspended employees pending a hearing, "however contemptible their behavior," would damage the morale of their co-employees and create outrage among the taxpaying public. States Br. 11-12. Citing *Mathews*, they also contend that it would be cost-prohibitive to continue to provide pay to employees pending a hearing. *Id.* at 10-11.

Amici's points might be well-taken if suspended employees were paid for an extended period of time—for example, as was argued in *Mathews*, until a full-blown evidentiary hearing were held. But what is at issue here is perhaps a few days of pay. Indeed, if such hearings avoid erroneous suspensions, they will actually save the employer money by eliminating the need to pay a substitute employee for an extended period of time, as well as back pay to an employee wrongfully suspended.

Further, both an employee's co-workers and the public can certainly appreciate that, under our system, there are "higher values than speed and efficiency." *Fuentes*, 407 U.S. at 90, n.22 (*quoting Stanley v. Illinois*, 405 U.S. at 656). They can also understand that "these rather ordinary costs [of a prior hearing] cannot outweigh the constitutional right" (*id.*), and that an individual is entitled to some opportunity to present his side of the story before he is judged to have behaved "contemptibly." [9]

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[9] There is no merit to the contention of the United States that the Court should remand the case for further findings and a re-application of the *Mathews* balancing test. U.S. Br. at 23-25. The court of appeals did apply the *Mathews* factors; the United States simply disagrees with the balance the court struck. As we have shown, however, the court of appeals correctly determined that—because the University could have suspended Homar with pay briefly, to allow time for him to respond to the charges—it failed to provide an adequate justification for denying Homar a pre-deprivation hearing.

Further, contrary to the suggestions of the United States (Br. 24), the record is clear that Homar's pay was interrupted when he was indefinitely suspended, for the University had to provide him with backpay twice. Nor is there a need for an examination of the collective bargaining agreement, as the United States suggests (Br. 24), because both parties agreed that Homar—who had completed a six-month probationary period—was a "tenured" employee who had a property interest in employment. *See* Pet. Br. 4. In addition, the petitioners had ample opportunity below to establish their interest in summary suspension without pay (*see* U.S. Br. 24); they attempted to do so by citing governmental interests in effective law enforcement, public confidence, and the like. Finally, there is no reason to address the adequacy of the

III. A GENERAL RULE REQUIRING A PRE-SUSPENSION HEARING NOTWITHSTANDING A TENURED EMPLOYEE'S ARREST IS CONSISTENT WITH FEDERAL CIVIL SERVICE LAWS AND DOES NOT THREATEN CONGRESSIONAL CHOICES REGARDING PROBATIONARY EMPLOYEES OR NATIONAL SECURITY-BASED SUSPENSIONS

In its brief (at 21-23), the United States contends that an affirmance of the decision below would intrude upon congressional choices to deny pre-suspension hearings to probationary federal employees and to authorize summary suspensions of employees suspected of treason. Both of these contentions are meritless.

A. The federal government's argument regarding the due process rights of probationary employees is a red herring. Due process does not apply unless an employee has a property interest in his position. Employees who may be terminated at will lack a property interest in their jobs. *See Board of Regents v. Roth,* 408 U.S. at 576-78; *Bishop v. Wood,* 426 U.S. 341 (1976).

The lower courts have routinely equated probationary status with at-will employment, and held that probationary employees lack a property interest in their jobs. *Orange v. District of Columbia,* 59 F.3d 1267, 1274 (D.C. Cir. 1995); *Finley v. Giacobbe,* 79 F.3d 1285, 1297-98 (2d Cir. 1996); *Blanding v. Pennsylvania State Police,* 12 F.3d 1303, 1307 (3d Cir. 1993).

It is well established in the federal sector that probationary employees serve at the will of the federal employer and may be terminated for any reason (except of course, a prohibited one, such as racial discrimination). *See United States Department of Justice v. FLRA,* 709 F.2d 724 (D.C. Cir. 1983). The Tenth Circuit has specifically held that probationary federal employees do not have a prop-

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post-deprivation process, for the due process violation alleged in this case was the failure to provide any pre-deprivation process.

erty interest in their jobs. *Walker v. United States*, 744 F.2d 67 (1984).

The argument of the United States regarding the effect of affirmance of the court of appeals decision upon the rights of federal probationary employees is, therefore, without merit. Any due process requirement that Court may discern will not apply to non-tenured, probationary employees.

B. A decision by this Court confirming a general rule that requires a limited pre-deprivation hearing before an indefinite suspension would also not cast doubt on the validity of the federal government's procedures in the national security context, as urged by the United States (Br. 23). The applicable provision, 5 U.S.C. 7532, authorizes the heads of certain federal agencies to suspend an employee summarily and without pay when they determine that the interests of national security so require.

Under this provision, there is no pre-suspension process. The employee is entitled to notice of the reasons for the action only "[t]o the extent that the head of the agency determines that the interests of national security permit." 5 U.S.C. 7532(a). The employee is also entitled, after the suspension, to a written statement of the charges against him, as specific "as security considerations permit;" an opportunity to answer; a hearing; a review of his case by the agency head; and a written decision by the agency head. *Id.* at 7532(c).

Section 7532 was originally a wartime measure that conferred a power of summary *removal*. When the wartime measure was permanently reenacted in 1950, the summary removal provisions were amended to provide for summary suspension, with procedural protections to follow. *See* S.Rep. No. 1155, 80th Cong., 2d Sess. 3 (1948); H.R. Rep. No. 2330, 81st Cong., 2d Sess. 2, 4 (1950); S.Rep. No. 2158, 81st Cong., 2d Sess. (1950), *reprinted in* 1950 U.S. Cong. Code & Admin. News 3278, 3279. Even as modified, the procedures of section 7532 are "harsh and drastic." *Department of the Navy v. Egan*, 484 U.S. 518, 533 (1988). They are appropriately invoked only in a "special class of national security cases," in response to "an immediate threat of harm to the 'national security.'" *Cole v. Young*, 351 U.S. 536, 546 (1956), *quoted in Carlucci v. Doe*, 488 U.S. 93, 102 (1988). Such procedures are reserved for cases where "normal for cause dismissal procedures could cause serious damage to the national security." *Doe v. Cheney*, 885 F.2d 898, 905 (D.C. Cir. 1989); *see also Cole*, 351 U.S. at 546 (summary suspension is for cases where an employee "could cause serious damage to the national security during the delay incident to an investigation and the preparation of charges").[10]

The justification for such drastic procedures—the "extraordinary" circumstances warranting departure from the normal requirements of due process—lies in the vital governmental need to protect the national security. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). To preserve the Nation from the "immediate threat of harm" (*Carlucci v. Doe*, 488 U.S. at 102) and to avoid the disclosure of highly sensitive information, summary procedures may be the only possible course of action.

In this context, a meaningful pre-deprivation hearing might require the agency to disclose confidential information and sources to an individual who is suspected of treason. To meet the governmental need for confidentiality, the statute itself permits an agency head to disclose the reasons for a summary suspension only to the extent that the agency head "determines that the interests of national security permit." 5 U.S.C. 7532(a). Where material information must be suppressed in the interest of national security, the conduct of a hearing prior to suspension without pay would be a meaningless formality.

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[10] Normally, agencies respond to national security threats by revoking an employee's security clearance and then employing the ordinary disciplinary procedures under 5 U.S.C. 7513, with their accompanying procedural protections. It is well settled that federal employees have no property interest in their security clearances. *Department of Navy v. Egan*, 484 U.S. at 528. Following the revocation of a security clearance, an employee is subject to removal for "cause" because he is no longer able to perform the functions of his position. *Id.* at 530; *Doe v. Cheney*, 885 F.2d at 905-06.

In short, suspensions for national security reasons under section 7532 are in a unique category. This Court can craft a general rule applicable to indefinite suspensions outside the national security context. Such a rule would have no impact upon national security cases, just as the rule in *Loudermill* regarding terminations does not necessarily determine the result in the context of a dismissal for national security reasons.

CONCLUSION

The decision of the court of appeals should be affirmed.

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Supreme Court, U.S.
FILED
MAR 6 1997
CLERK

(9)

No. 96-651

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JAMES E. GILBERT, *et al.*,
Petitioners,
v.
RICHARD J. HOMAR,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

20 pp

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BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief *amicus curiae* is filed by the National Education Association ("NEA"), with the written consent of the parties, in support of respondent Richard J. Homar.

INTEREST OF AMICUS CURIAE

NEA is a nationwide employee organization with a current membership in excess of 2.2 million persons, the vast majority of whom are employed by public school districts, colleges, and universities throughout the United States. NEA (through a network of affiliated state and local associations) represents its members in dealing with their employers in regard to salaries, hours, and working conditions. This representation often is based on rights that are guaranteed to public employees by the United States Constitution, including the right to procedural due process under the Fourteenth Amendment.

SUMMARY OF ARGUMENT

In *Mathews v. Eldridge,* 424 U.S. 319 (1976), this Court set forth a three-factor balancing test to be used in "consider[ing] the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter." *Id.* at 333. Applying these factors to the termination of a tenured public employee in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985), this Court held that a minimal predeprivation "hearing" —*i.e.,* notice and an opportunity to respond—is constitutionally required.

When respondent Homar, a "tenured" public employee within the meaning of *Loudermill,* was arrested on drug charges, he was suspended—both from his employment duties as a member of petitioners' police force *and* from pay status—without a predeprivation hearing. Although this case differs from *Loudermill* in that the deprivation Homar suffered was not termination of his employment, but rather suspension without pay, a predeprivation hearing would be required *unless,* under the exception recognized in *FDIC v. Mallen,* 486 U.S. 230, 240 (1988), the necessity for immediate governmental action justified postponement of that hearing. There is no dispute about the fact that petitioners' interest in maintaining public safety and preserving the integrity of their police force justified the immediate suspension of Homar from his duties as a police officer. But neither that interest—nor any other government interest—justified petitioners in suspending Homar's pay without first affording him the minimal due process requirements of notice and an opportunity to respond.

The principle adopted by the Third Circuit—that, as a general matter, a public employer must provide notice and an opportunity to respond before suspending a tenured employee from pay status—provides clear constitutional guidance to public employers who must make day-to-day employment decisions. The Third Circuit's principle is, moreover, eminently workable, as evidenced, *inter alia*, by the fact that it parallels the regulations that govern federal employment.

ARGUMENT

PETITIONERS' INTEREST IN IMMEDIATELY SUSPENDING RESPONDENT FROM HIS EMPLOYMENT DUTIES DID NOT ALSO JUSTIFY SUSPENDING HIM FROM PAY STATUS WITHOUT A PREDEPRIVATION HEARING

A. The Analytical Framework

The issue presented in this case can be appropriately framed by setting forth certain fundamental propositions as to which there is no dispute:

1. As a general rule, due process requires that deprivation of a constitutionally protected property interest must "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Loudermill*, 470 U.S. at 542 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). This Court repeatedly has made clear that " 'the root requirement' of the Due Process Clause [is] 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.' " *Loudermill*, 470 U.S. at 542 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)) (emphasis in original).

2. The requisite predeprivation "hearing" need not be elaborate. In holding that a hearing was required prior to *termination* of the employment of a tenured public

employee,[1] this Court stated that a "full evidentiary hearing" is not required prior to the deprivation. *Loudermill*, 470 U.S. at 545. Rather, "something less," *id.* (quoting *Mathews*, 424 U.S. at 343), is sufficient: "[T]he pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions . . . ." *Loudermill*, 470 U.S. at 545. This Court then described the required predeprivation hearing as follows:

> The essential requirements of due process . . . are notice and an opportunity to respond. . . . The tenured public employee is entitled to *oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.*

Id. at 546 (emphasis added). Certainly no more would be required here, when the issue is suspension as opposed to termination.

3. Although the requirement for this minimal predeprivation hearing is not absolute, this Court has emphasized the exceptional nature of any departure from the requirement:

> We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in " 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' "

United States v. James Daniel Good Real Property, 510 U.S. 43, 53 (1993) (quoting *Boddie*, 401 U.S. at 379). One circumstance—and the only one even arguably applicable here—under which a postdeprivation hearing will be held to satisfy constitutional requirements is where "the necessity of quick action by the State," *Parratt v. Taylor*, 451 U.S. 527, 539 (1981), precludes a predeprivation hearing. Thus, "[a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Mallen*, 486 U.S. at 240.

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[1] In this brief, we use the term "tenured"—as this Court used the term in *Loudermill*—as a shorthand designation for an employee who, by virtue of applicable state law, has a property interest in continued employment. There is no dispute that Homar had such a property interest. *See Homar v. Gilbert*, 89 F.3d 1009, 1014 (3d Cir. 1996).

4. There is no contention in this case that petitioners were required to provide Homar with a hearing before suspending him *from his employment duties*: petitioners' interest in maintaining public safety and preserving the integrity of their police force surely justified this action immediately upon Homar's arrest on drug charges. *See Homar v. Gilbert*, 89 F.3d 1009, 1015 (3d Cir. 1996) ("We agree with the district court that there was a compelling governmental interest which supports ESU's decision to suspend Homar [from his employment duties] immediately and without a hearing pending further investigation.").

It is within the analytical framework established by the foregoing propositions that we turn to the narrow question this case presents: whether the government interest that justified petitioners' departure from the general rule of a predeprivation hearing in suspending Homar from his duties as a police officer, *also* justified suspending Homar from *pay status* without first affording him the minimal due process rights set out by this Court in *Loudermill—i.e.*, notice of the charges against him and an opportunity to present his side of the story to the decisionmaker. *See* 470 U.S. at 546. As we now show, the answer to this question is "no."

B. The *Mathews v. Eldridge* Balancing Test

In *Mathews v. Eldridge, supra,* this Court set forth a three-factor balancing test to be used in "consider[ing] the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter." *Mathews,* 424 U.S. at 333. These factors are:

> *First*, the private interest that will be affected by the official action; *second*, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and *finally*, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335 (emphasis added). Application of these factors led this Court in *Loudermill, supra,* to conclude that a predeprivation hearing—*i.e.*, notice and an opportunity to respond—is constitutionally required when government seeks to terminate the employment of a tenured public employee. 470 U.S. at 542-45. The same conclusion follows in the present context.

1. This case differs from *Loudermill* in regard to "the private interest that [is] affected by the official action," 470 U.S. at 335, in that the deprivation suffered by Homar was not termination of employment, but rather—as pertinent to the issue that is before this Court—suspension from pay status. Although the district court thought it "unclear whether due process protections extend to employment discipline short of termination," Pet. App. at 59a, the Third Circuit had no doubt on this score, "find[ing] the requirements of *Loudermill* to be applicable in this instance." 89 F.3d at 1014. The Third Circuit clearly was correct: Homar had a property interest in his continued employment, and he was deprived of a substantial aspect of that property interest—*i.e.*, his right

to an uninterrupted flow of income. As this Court observed in *Loudermill*:

> We have frequently recognized the severity of depriving a person of the means of livelihood. While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.

470 U.S. at 543 (citations omitted).

As to an employee's ability to "find employment elsewhere," the stigma of a suspension from employment hardly will be less than that which stems from a termination of employment. One can readily recognize the difficulties Homar would have encountered had he informed potential employers that he was looking for a new job because he had been suspended from his position as a police officer as a result of his arrest on drug charges. Even after the criminal charges against him were dismissed, the stigma likely would have remained. Indeed, although both a terminated and a suspended employee doubtless would hope to resume their prior employment, because of the inherent ambiguity of a suspension, the latter would, if anything, be less likely than the former to seek—much less be successful in obtaining—alternative interim employment.

Nor can it be determinative that a suspension is, by definition, temporary, for even a temporary loss of income can be as ruinous as a termination of employment. As a recent study has confirmed, a large proportion of Americans—about one-third—live from paycheck to paycheck (or worse), unable to accumulate savings that would absorb the impact of even a temporary loss of income. *See* Ellen Graham, *What Money Just Can't Buy*, Wall Street J., Sept. 20, 1996, 1996 WL-WSJ 11799143. The "severity of depriving a person of the means of livelihood" that this Court recognized in *Loudermill*, 470 U.S. at 543, may be tempered, but it hardly is obviated, by the temporary nature of the deprivation.

That is particularly the case where, as here, the suspension is of indeterminate duration. Homar's pay was suspended "pending further investigation and disposition of the criminal charges" against him. 89 F.3d at 1012. Had his case gone to trial, Homar's suspension could well have continued for months, or conceivably even years. Moreover, as the letter of suspension informed Homar, petitioners' action would not necessarily "coincide" with the disposition of the criminal charges. *Id.* The suspension was thus truly of indefinite duration—and in fact it was prolonged well past the time the state court ordered the criminal charges dismissed. *Id.* Under such circumstances, the interest of Homar that was affected by petitioners' action clearly is substantial.

2. The risk of "an erroneous deprivation" of the employee's interest is the second factor in the *Mathews* balancing test. As this Court observed in *Loudermill*, "some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision." 470 U.S. at 543. That is so, this Court noted, both because of the possibility of factual disputes relating to the basis for the disciplinary action, and because a hearing before the discipline takes effect is likely to be the employee's "only meaningful opportunity to invoke the discretion of the decisionmaker." *Id.*

Petitioners contend that analysis of the second *Mathews* factor in this case is controlled by *Mallen, supra,* rather than *Loudermill.* In *Mallen*, this Court indicated that in exceptional cases where an important government interest demanded immediate action, a predeprivation hearing could be dispensed with if there were "a substantial assurance that the deprivation is not baseless or unwarranted." 486 U.S. at 240. Unlike *Mallen*, however, where the "substantial assurance" derived from the fact that "[a] grand jury had determined that there was probable cause to believe that appellee had committed a felony," *id.* at 241, there was no such judicial determination of probable cause in this case. Homar's arrest was based solely on the decision of the policeman who found Homar at the scene of a drug raid. And when Homar's case was brought before the judiciary at a hearing six days after his arrest, the court dismissed all charges against him. *See* 89 F.3d at 1012. Inasmuch as there never was any judicial determination of probable cause, and the charges against Homar were dismissed as soon as they came before a court, the suggestion of petitioners and their *amici* that the same "substantial assurance" was present here as in *Mallen* is, to say the least, unconvincing.

Petitioners also suggest that a hearing would have been of little value in this case because applicable state regulations *required* petitioners to suspend Homar without pay "as soon as practicable" after his arrest on a felony charge. Brief for Petitioners at 20-21 (quoting 4 Pa. Code § 7.173); *see id.* at 3-4. Thus, petitioners argue that the decision to suspend Homar from pay status involved no discretion, and turned only on the undisputed fact that he had been arrested on a felony charge. But the record does not support this argument.

In the first place, petitioner Levanowitz—the Director of Human Resources who made the decision to suspend Homar—was equivocal on whether he believed the regulation in question (part of the Governor's Code of Conduct for Appointed Officials and State Employees) was binding upon him. Levanowitz testified on deposition that, while he "did refer to this [regulation] and let it guide my actions *somewhat* in this case," Joint Appendix at 67a (emphasis added), he was "not sure" that he was "obliged" to follow it in suspending Homar. *Id.* at 66a-67a. Indeed, if the regulation petitioners cite had been the basis for Homar's suspension, the suspension would have been lifted when the criminal charges against him were dismissed. But it was not. In informing Homar of his suspension, Levanowitz stated that the university's action would not necessarily "coincide with the disposition of those [criminal] charges through the legal process," 89 F.3d at 1012, and although all criminal charges against Homar were dismissed six days after his arrest, the suspension without pay remained in effect for another 23 days. *Id.*

In short, whether Levanowitz thought himself bound by the state regulation or not, he imposed a suspension without pay that was to (and did) remain in effect well beyond the regulation's requirements. Far from the almost ministerial act petitioners portray, Levanowitz' decision to suspend Homar for an indefinite period independent of the resolution of the criminal charges against him—and the decision to continue the suspension even after the criminal charges were dismissed—quite evidently involved both the consideration of factual issues other than simply Homar's arrest, and the exercise of discretion on the part of Levanowitz. In respect to these decisions, the opportunity for Homar to present his side of the story would have been of "obvious value in reaching an accurate decision." *Loudermill,* 470 U.S. at 543.

3. In this case, it is the third factor of the *Mathews* balancing test—*i.e.,* "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail," *Mathews,* 424 U.S. at 335—that is decisive. Only an "*important* government interest," one "demanding prompt action," will "justify postponing the opportunity to be heard until after the initial deprivation." *Mallen,* 486 U.S. at 240 (emphasis added). *See also* Brief for the United States at 14, 20 (requisite government interest must be "weighty").

In applying this factor, we reiterate that the question in this case is *not* whether there was a sufficiently "important government interest" to justify suspending Homar from his employment duties without notice and an opportunity to be heard—it is conceded that such an interest existed.

The question concerns Homar's suspension from pay status, and in this regard one searches in vain for *any*—much less an "important" or "weighty"—government interest.

In purporting to find the necessary government interest, the district court commented as follows:

> Homar was certainly charged with important law enforcement responsibilities and the preservation of public safety. His arrest on a drug-related charge implicated important governmental interests in maintaining public confidence in our law enforcement agents.

Pet. App. at 61a. Those interests, to be sure, were sufficient to justify petitioners' decision to suspend Homar from his duties as a police officer without a predeprivation hearing. But they do not speak to Homar's immediate suspension from pay status. As the Solicitor General puts it in his brief on behalf of petitioners, "[t]he district court appeared to assume interests in law enforcement integrity and public safety that address the suitability of Homar remaining in a duty status *but that do not concern the appropriateness of his being suspended without pay*." Brief for the United States at 24 (emphasis added).

While it is true, as another of petitioners' *amici* points out, that "[t]he Court's cases recognize that even as substantial an interest as maintaining one's livelihood must at times yield to the government's interest in taking prompt action," Brief of the International City-County Management Association *et al.* at 6, those interests simply are not in conflict here. The government's concededly important interest in ensuring that a police officer arrested on felony drug charges does not continue to function as a police officer can be fully vindicated by immediately suspending him from his employment duties—*without* also suspending the officer's pay before affording him notice and an opportunity to respond.

The only interest that even arguably might militate against a suspension *with pay* pending a hearing is petitioners' fiscal interest in avoiding the expense of paying Homar while he was not performing any employment duties. But recognition of the nature of the "hearing" in question makes it clear that this fiscal interest is truly *de minimis*. As we have previously noted, the hearing to which the employee is entitled prior to suspension from pay status is not a full adversary hearing, but simply "notice and an opportunity to respond." *Loudermill*, 470 U.S. at 546. Nor is this a hearing at which the employer need "definitively resolve the propriety" of the suspension from pay status; rather, it is merely "an initial check against mistaken decisions." *Id.* at 545. Thus, the employer is under no compulsion, prior to this hearing, to investigate the matter fully, to prepare a case for presentation to a hearing officer, or even to gather any additional evidence beyond that which sparked the proposed suspension. The Due Process Clause requires, at this point, only that the employer stay its hand until notice of the proposed action has been given to the employee, and the employer has listened to what the employee has to say in response.[2]

Absent unusual facts (such as, for example, an employee at a distant location), such a hearing need delay the employer's action by no more than a few days.[3] Accordingly, even when an important government interest requires that an employee be suspended from his employment duties before a hearing can be held, the cost of continuing the employee in pay status until he can be given notice and an opportunity to respond will be minimal. As in *Loudermill*, "affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays." 470 U.S. at 544.

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[2] Because of the minimal and preliminary nature of the predeprivation hearing at issue, the considerations here are quite different from those that were before this Court when it considered the timing of a *postdeprivation* hearing in *Mallen*. Inasmuch as that hearing was to render "the ultimate decision" on Mallen's suspension, 486 U.S. at 244, this Court observed that "[t]he magnitude of the public interest in a correct decision counsels strongly against any constitutional imperative that might require overly hasty decisionmaking." *Id.*

[3] As the Solicitor General points out, the "reasonable time to answer" that federal regulations provide for federal employees threatened with suspension (of 14 days or less) is defined as "not less than 24 hours." Brief for the United States at 4 (citing 5 U.S.C. § 7503(b); 5 C.F.R. § 752.203(c)).

In support of their position, petitioners rely on two cases in which this Court has held suspensions permissible without a predeprivation hearing. *See Mallen, supra* (Federal Deposit Insurance Corporation ("FDIC") order suspending officer of federally insured bank); *Barry v. Barchi*, 443 U.S. 55 (1979) (state racing board suspension of horse trainer's license). But this reliance is misplaced. Neither *Mallen* nor *Barry* involved the government interest in suspending the employees' pay;[4] both were concerned with the admittedly more weighty government interest in removing the employees from their employment duties. *Mallen*, in particular, points up the dispositive significance of this difference.

In *Mallen*, the FDIC, acting pursuant to federal law, ordered the immediate suspension of a bank president and director from any further participation in the bank's affairs (or the affairs of any other federally insured bank), upon his indictment for making false statements to the FDIC and the bank. 486 U.S. at 236-38. While the issue before this Court was the timing of the *postdeprivation* hearing to which Mallen was entitled, this Court observed along the way that postponement of the hearing until after the suspension took effect clearly was justified by "the congressional finding that prompt suspension of indicted bank officers may be necessary to protect the interests of depositors and to maintain public confidence in our banking institutions." *Id.* at 240-41. That observation was eminently understandable, because the government interest simply could not accommodate a delay in suspending Mallen from involvement with the banking industry. In this case, the equally important government interest was fully vindicated by suspension of Homar from his duties as a police officer. Postponement of the only thing that is at issue here—Homar's suspension from pay status—in no way impairs that government interest.

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[4] This undoubtedly was because the action in both cases was taken not by the employers, but by government regulatory agencies. Whether the employees continued to be paid by their employers during the suspensions probably was a matter as to which the government agencies were indifferent; as far as can be discerned from the case reports, at any rate, the issue was not raised by the suspension orders.

In sum, petitioners can take no comfort in *Mallen* and *Barry*. Indeed, by contrast to the facts of this case, *Mallen* and *Barry* reinforce the conclusion that the government interest involved here in no way justified postponement of Homar's hearing until after his suspension from pay status took effect.

C. The Clear and Workable Principle Articulated by the Third Circuit

The Third Circuit resolved this case on the basis of the general principle that "a governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard." 89 F.3d at 1016. As we have just shown, that principle derives from a faithful application of the *Mathews* balancing test, which this Court traditionally has used to determine what process is due in a given set of circumstances.

Petitioners and their *amici* assert that the Third Circuit deviated from the "flexible" analysis called for in *Mathews*, and instead adopted a "rigid" "per se rule" that "depart[s] from *Mathews*" and "carve[s] out an exception to the *Eldridge* balancing test." *See* Brief for

Petitioners at 17-18; Brief for the United States at 14; Brief of the States of Alabama *et al.* at 7-8. This "flexibility" argument is a red herring. The principle articulated by the court below is no more a departure from *Mathews* than is, for example, the principle adopted by this Court in *Loudermill* that the Due Process Clause "requires 'some kind of hearing' prior to the *discharge* of an employee who has a constitutionally protected property interest in his employment." 470 U.S. at 533 (syllabus of the reporter) (emphasis added). In both cases, the requirements of the Due Process Clause have been interpreted with respect to a particular class of cases.[5]

There simply is no merit to the contention, implicit in the briefs of petitioners and some of their *amici*, that courts may not interpret the requirements of the Due Process Clause by developing general categorical rules, but rather must decide every case from scratch through a balancing of the *Mathews* factors. *E.g.*, Brief of the States of Alabama *et al.* at 4. Such an approach would place public employers, who must apply this Court's decisions on a day-to-day basis, in an untenable position. As petitioners themselves have observed, "[w]hen these situations arise, it is important that officials know what they may and may not do, consistent with the Constitution, to protect the public." Petition for Certiorari at 12-13. The principle articulated by the Third Circuit provides precisely such guidance.

That principle is also one that is workable for the government employers who must apply it—as is evident from the Solicitor General's assurance that "[t]he procedural safeguards currently provided in routine federal disciplinary actions generally comport with the [Third Circuit's] rule." Brief for the United States at 2; *see also id.* at 4-5.[6] There is no reason to think that state and local public employers could not comply with the demands of due process as well as does the federal government.[7]

---

[5] Obviously, the articulation of a general principle, such as that set forth by this Court in *Loudermill* or the Third Circuit here, does not preclude a court from considering whether a different result is required on facts that differ in some pertinent respect from those previously considered.

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[6] Tellingly, the Solicitor General is able to identify only two circumstances under which the principle articulated by the court below would impinge on "congressionally mandated procedures." Brief for the United States at 21-23. The first is in the case of probationary employees—but because such "nontenured" employees have no property right in continued employment, the principle articulated by the Third Circuit simply has no application to them. *Board of Regents v. Roth*, 408 U.S. 564 (1972). As to suspensions for national security reasons under 5 U.S.C. § 7532, there may or may not be a constitutional basis for making an exception in such cases to the general principle articulated by the Third Circuit. But that question can await resolution until a case presenting it arises; that such a national security exception might be appropriate in no way undermines the principle applicable generally to tenured public employees.

[7] A case from the federal sector illustrates the appropriate manner—both constitutionally and administratively—of dealing with an employee who must be suspended from duty without delay. Upon his arrest on charges of rape and other sex offenses, the employee in *Engdahl v. Department of Navy*, 900 F.2d 1572 (Fed. Cir. 1990),

> was placed on administrative leave (non-duty/with pay) until further notice. . . . On January 7, 1988 Engdahl received notice that the government intended to suspend him without pay. Engdahl was then provided an opportunity to reply, which he personally did to government officials on January 25. . . . The government issued a decision letter on January 29, 1988 suspending Engdahl without pay, effective February 1, 1988.

Id. at 1573.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 6 1997
OFFICE OF THE CLERK

(10)

Record No. 96-651

In The Supreme Court of the United States

October Term 1996

JAMES E. GILBERT,
Petitioner,

v.

RICHARD J. HOMAR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION AS *AMICUS CURIAE*

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QUESTION PRESENTED

1. Whether the Fourteenth Amendment's Due Process Clause requires that a public employee be afforded procedural due process-protection before imposing a suspension of employment which causes substantial, stigmatizing and permanent career and other adverse affects and injuries?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION AS *AMICUS CURIAE*

INTEREST OF THE AMICUS CURIAE

The Southern States Police Benevolent Association (hereafter SSPBA) is a non-profit association comprised of over twenty thousand law enforcement officers and related public employees in eleven states. SSPBA and its state affiliates engage in various types of advocacy, lobbying, litigation and scientific analyses of various law enforcement issues. SSPBA promotes improved law enforcement and constitutional protection for everyone.

SSPBA and its members are vitally interested in the grave constitutional issues before this Court. Law enforcement officers are frequently victims of constitutional torts, often in the employment context. In the experience of SSPBA, law enforcement officers are frequently subjected to constitutional deprivations and other workplace injuries that adversely affects the delivery of police services and the public safety. SSPBA has litigated a number of cases involving similar issues of procedural due process. SSPBA accordingly submits this brief to assist this Court in its resolution of this important case.[1]

STATEMENT OF THE CASE

Amici adopt the Statement of the Case and Facts as presented by Respondent.

SUMMARY OF ARGUMENT

Law enforcement officers are constitutionally entitled to procedural due process when they are suspended without pay because a suspension is a substantial, as opposed to a de minimis, constitutional deprivation. As America approaches a new century, complaints against law enforcement officers continue to skyrocket. Some are legitimate, however many are not. Many of those complaints represent nothing more than angry citizens who have had an unpleasant encounter with an officer. In many such encounters, law enforcement officers are verbally abused, spit on, harassed, assaulted, battered, stabbed, shot and sometimes killed.

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[1] The parties have consented to the filing of this brief amicus curiae. Letters indicating their consent have been filed with the Clerk of Court.

Officers need predeprivation procedural protection before suspensions because pre-suspension hearings often demonstrate the falsity of allegations against officers and therefore avoids the imposition of unjust punishment. Post-deprivation process is not adequate because even full awards of backpay cannot repair the permanent damage inflicted upon officers who are permanently stigmatized with a suspension. Even if the suspension is reversed, most agencies retain records of the suspension and the officer must disclose even a reversed suspension to future prospective employers. In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985), this Court held that the Due Process Clause entitles an employee to a hearing "before he [or she] is deprived of any significant property interest..." A suspension constitutes such a significant deprivation.

Pre-suspension procedural due process can often be conducted in a matter of minutes. The benefits to officers, their employers and the public far outweigh any conceivable administrative burdens associated with suspension hearings. Affording presuspension due process is simple, without significant burden, but vitally important in the scheme of constitutional protection for law enforcement officers who are subjected to daily risks of death for their public service. The constitutional balance should be struck in favor of presuspension due process because the constitutional rights of law enforcement officers "must be afforded great weight." *Konraith v. Williquette*, 732 F. Supp. 973, 978 (W.D. Wis. 1990).

I. UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, PUBLIC EMPLOYEES ARE ENTITLED TO PROCEDURAL DUE PROCESS WHEN THEY ARE SUSPENDED WITHOUT PAY BECAUSE A SUSPENSION CONSTITUTES A CONSTITUTIONAL DEPRIVATION

> Law enforcement officers are not relegated to a "watered down version of constitutional rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).
>
> "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. U.S.*, 318 U.S. 332, 347 (1947).

Procedural due process rights are particularly important because procedural due process is often the only non-litigation check on an erroneous personnel decision that may ruin the career of a law enforcement officer. The essence of procedural due process "reflects a fundamental value in our American constitutional system." *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971). Essentially, procedural due process requires that a meaningful predeprivation opportunity to be heard must be afforded to a public employee who has a property or liberty interest in his or her employment. *Cleveland Board of Ed. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).[2] "In America, with the object of preventing an arbitrary government, procedural safeguards were guaranteed to all persons by the inclusion of due process clauses..." *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988).

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[2] See Friendly, *"Some Kind Of Hearing,"* 123 U.Pa. L. Rev. 1267 (1975); *Developments In The Law of Public Employment*, 97 Harv. L. Rev. 1611, 1780 - 1800 (1984).

As explained in *Daniels v. Williams*, 474 U.S. 327, 331 (1986), the touchstone of due process involves "protection of the individual against arbitrary action of government..." "This history reflects the traditional and common sense notion that the due process clause, like its forbear in the Magna Carta... was intended to secure the individual from the arbitrary exercise of the powers of government," quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884).

A. The Rationale For Procedural Due Process Protections

The laws governing law enforcement employment relations profoundly affects the efficiency and quality of law enforcement services and the daily lives of officers everywhere. Law enforcement agencies, officers and the public are better served by meaningful predeprivation procedural due process protections for officers. Procedural due process protection safeguards against mistakes and errors which can deprive an officer of his or her entire career including the well being of the officer's entire family. Similarly, an erroneous decision can deprive the agency of a good officer. With the tremendous cost of properly training new officers, it makes sound economic sense to afford presuspension due process to officers as many officers will likely be saved from arbitrary and erroneous adverse employment action.

Presuspension due process promotes efficiency in the workplace. It promotes employee confidence and positive morale. This in turn leads to valuable benefits for everyone. A positively motivated law enforcement workforce breeds an environment of collegiality, efficiency and esprit de corps. Without presuspension due process, erroneous decisions go unchecked. Denials of due process frustrate the entire system by demoralizing valuable officers and rewarding abusive management officials for their own misconduct. The presuspension procedural due process sought by Richard Homar would tend to negate these ill effects.

As government has grown, so has the power of governmental employers.[3] Americans from all walks of life need constitutional protection from increasingly arbitrary and oppressive government power, more often at the local level.[4] Contemporary law enforcement bureaucracies present vast opportunities for abusive bureaucrats to employ retaliatory tactics on personal missions of retaliation.[5] The tremendous volume of reported cases adjudicating the rights of law enforcement officers demonstrate the frequency and intensity of workplace related harassment of law enforcement officers.[6]

Imagine working for a bureaucrat who could suspend you at whim, whether based on false allegations, mere rumor or based upon absolutely nothing at all. Without presuspension procedural due process, law enforcement officers are often left with this nightmare.

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[3] Millions of individuals are employed by more than eighty two thousand governmental units at local, state, and federal levels. As of 1991, more than 18 million persons were employed by local, state or the federal government. See *Waters v. Churchill*, 114 S.Ct. 1878, 1899 n. 3 (1994)(Stevens, J. and Blackmun, J., dissenting)(citing the 1991 figures from the U.S. Department of Commerce Statistical Abstract of the United States, Table No. 500, page 318 (113 ed. 1993).

[4] See Senator Sam J. Ervin, Jr., *Preserving The Constitution* 165, 213 - 214 (1984); Boward, *Lost Rights: The Destruction of American Liberty* 1-6, 49 - 51 (1995). See generally McGuinness, *Equal Protection For Non-Suspect Class Victims of Governmental Misconduct: Theory and Proof of Disparate Treatment and Arbitrariness Claims*, 18 Campbell L. Rev. (1997).

[5] See *Board of County Commissioners v. Umbehr*, 116 S.Ct. 2342, 2347 (1996)(cataloging cases of government retaliation in different contexts); McGuinness, *Equal Protection For Non-Suspect Class Victims of Governmental Misconduct: Theory and Proof of Disparate Treatment and Arbitrariness Claims*, 18 Campbell L. Rev. (1997).

[6] See Levinson, *Silencing Government Employee Whistleblowers In The Name of "Efficiency"*, 23 Ohio Northern U. L. Rev. 17 (1996)(cataloging numerous cases demonstrating retaliation against police officers).

The critical importance of procedural due process protections has long been emphasized. Many cases have "recognize[ed] and respect[ed] the role that procedural due process has played in preventing arbitrary deprivations of individual liberty and property..."[7] This logic, underscored by such historic decisions from this Court as *Loudermill, McGrath* and *McNabb*, demonstrate the importance of the time honored American tradition of procedural due process protection. Recognizing this historic protection in the context of employee suspensions is logical and necessary.

In recent years, this Court has emphasized a flexible procedural due process approach whereby a balancing test is employed on a case-by-case basis to determine what particular process is due in a given situation. *Matthews v. Eldridge*, 424 U.S. 319 (1976). The precise requirements of procedural due process depend upon the particular circumstances, *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), but the essential fundamentals remain constant.

The right to presuspension due process is so fundamental and so necessary that it should be a standard component in any law enforcement employment case unless there is an admission of misconduct by the employee that would unequivocally justify the suspension and the punishment imposed. Where there are disputed facts and contested positions, the predeprivation process is necessary in order to eliminate an officer from suffering a wrongful suspension of employment.

B. The *Loudermill* Standard Is Applicable To Suspensions

Over a decade ago in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), this Court provided additional guidance as to what predeprivation process must be afforded a public employee. In *Loudermill*, this Court held that at the predeprivation stage, "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Applying this settled standard to suspensions is logical and simple.

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[7] *Fields v. Durham*, 909 F.2d 94, 99 (4th Cir. 1990).

Loudermill established a two-stage procedure for minimum predeprivation process combined with a full post-deprivation hearing. *Garraghty v. Comm. of Va.*, 52 F.2d 1274, 1283 (4th Cir. 1995). First, a minimum predeprivation process must be provided before any adverse action can be taken. Second, a full post-deprivation hearing must be provided.[8] This recognition of "stages" of due process underscores the importance and fundamental nature of predeprivation process.

Loudermill recognized that there are some emergency situations in which a post-deprivation hearing may suffice,[9] although it appears that such an emergency situation will rarely exist in an employment setting. The emergency doctrine would continue to apply. In prior cases, the Court has invalidated state statutes which deprived individuals of property interests without predeprivation notice and hearing, even though the state offered post-deprivation procedures which could ultimately restore the property interests.[10] This Court has held that absent "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event," the government must provide the hearing before the deprivation takes place. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S.Ct. 492, 501 (1993); *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (6th Cir. 1996).

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[8] *Garraghty v. Comm. of Va.*, 52 F.3d 1274, 1283 (4th Cir. 1995); *Contoir v. University of Maine*, 35 F.3d 6, 12 -13 (1st Cir. 1994).

[9] *FDIC v. Mallen*, 486 U.S. 230, 240 (1988); *Ewing v. Mytinger & Cassleberry*, Inc.; 339 U.S. 594 (1950); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908). See *Parrett v. Taylor*, 451 U.S. 527, 539 (1981).

[10] *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 19-20 & n.26 (1978); *Snidach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Southern Railway Co. v. Virginia*, 290 U.S. 190 (1933).

In *Loudermill*, this Court held that the Due Process Clause entitles an employee to a hearing "*before* he [or she] is deprived of any significant property interest..." 470 U.S. at 542. The Third Circuit below correctly recognized this principle. There is no significant distinction between suspensions and terminations for purposes of procedural due process analysis.

II. A SUSPENSION OF EMPLOYMENT CAUSES SEVERAL TYPES OF SUBSTANTIAL HARM INCLUDING PERMANENT STIGMATIZING ADVERSE AFFECTS ON THE EMPLOYMENT'S CAREER THEREFORE REQUIRING DUE PROCESS PROTECTION

"A deprivation of constitutional dimensions occurs when the state stops the flow of benefits associated with a protected interest for any appreciable length of time." *D'Aquisto*, 640 F.Supp. at 609, citing *Memphis Light v. Craft*, 436 U.S. 1, 20 (1978). This Court has held that any interruption of the flow of benefits constitutes a deprivation. *Atkins v. Parker*, 472 U.S. 115, 128 n.31 (1985).

A suspension of employment typically causes devastating consequences to public employees. In addition to the monetary losses and consequences thereof, other protectable interests are also invaded. See *Homar v. Gilbert*, 89 F.3d at 1018 n. 7 (honor and respect of service). In *FDIC v. Mallen*, 486 U.S. 230, 240, 100 L.Ed. 2d 265 (1988), this Court recognized that a bank president's interest in the right "to continue to serve as president of the bank and to participate in the conduct of its affairs is a property right protected by the Fifth Amendment Due Process Clause." To be sure, law enforcement officers possess equal rights as compared with bank presidents.

A suspension of employment typically causes unique and particular injuries to law enforcement officers. A suspension becomes a permanent part of an officer's history, which remains for his or her entire career. Even if the suspension is set aside, it remains as a part of the officer's history and the officer has to disclose that to all future prospective employers. Typically, suspensions are required to be made public. See, e.g., N.C.G.S. 160A-168.

Most states have law enforcement certification agencies that maintain complete records of the certification and training of officers. E.g. N.C. Gen. Stat. ch. 17C-3; 17C-6, and administrative code of regulations, 12 N.C. Administrative Code. Thorough background investigations are typically required as officers move or attempt to change employment. See N.C. Administrative Code, section .0102. Forms are used which require officers to report all suspensions of employment, whether reversed or not.

A suspension is a "red flag" that will often, in and of itself, cause a prospective employer to eliminate an applicant. A suspension constitutes a direct attack on the officer's integrity. A suspension carries a badge of unprofessionalism in an occupational field where professionalism is an all important characteristic. Once a suspension is entered into an officer's personnel record, it flags the officer for all future prospective employers to consider. Many law enforcement employers weed out applicants who have such "black marks" as suspensions on their record, without digging behind the surface of the marks. All of this amounts to a substantial constitutional injury because the officer's occupational liberty is at stake. Law enforcement is a unique profession and occupational field where a suspension will haunt an officer forever.

III. THE WEIGHT OF AUTHORITY HOLDS THAT SUSPENSIONS ARE SUBSTANTIAL INJURIES THAT REQUIRE PREDEPRIVATION DUE PROCESS

The leading treatises recognize that "procedural due process applies in cases of discharge from employment, **temporary**

suspensions without pay, demotions, where employees are involuntary retired for a disability or are placed on an unpaid leave of absence for medical or psychological reasons..." Atchison, *The Rights of Law Enforcement Officers* 171 (3rd ed. 1996)(emphasis added); Silver, 2 *Public Employee Discharge and Discipline* section 17.9 at 318 - 19 (2nd ed. 1995).

"Temporary suspensions without pay are not de minimis and impinge on property interests." *Id.* quoting *Bailey v. Kirk*, 777 F.2d 567, 575 (10th Cir. 1985)(four day suspension of chief triggered predeprivation procedural due process); *Muscare v. Quinn*, 520 F.2d 1212, 1215 (7th Cir. 1975); *Thurston v. Deckle*, 531 F.2d 1264, 1273 (5th Cir. 1976), vacated on other grounds, 438 U.S. 901 (1978); *Golbeck v. City of Chicago*, 782 F. Supp. 381, 385 (N.D. Ill. 1992) *D'Acquisto v. Washington*, 640 F. Supp. 594, 609-10 (N.D. Ill. 1986); *Hopkins v. Mayor*, 600 F. Supp. 542, 547 (D. Del. 1984). In *Garraghty v. Jordan*, 830 F.2d 1295, 1299 (4th Cir. 1987), the Fourth Circuit held that a five day suspension of employment triggered procedural due process protection:

> We find that Garraghty's temporary suspension, though lasting only five days, was not a de minimis deprivation, for with that suspension he lost compensation and other emoluments of the office for the period of the suspension.

See *Click v. Board*, 609 F.Supp. 1199 (W.D.Mo. 1985)(three day suspension held not de minimis); *Best v. Boswell*, 696 F.2d 1282, 1289-90 (11th Cir. 1983)(two week suspension impinges property interest); *Louise v. Coluatti*, 606 F.2d 392, 401-02 (3rd Cir. 1979); *Brunn v. City of Cleveland*, 526 F.Supp. 564, 565-66 (N.D. Ohio 1981), aff'd 810 F.2d 199 (6th Cir. 1986). These and other cases consistently hold that temporary suspension from employment without pay triggers procedural due process protection as the Third Circuit held in this case.

IV. THIS COURT'S OPINION IN *GOSS V. LOPEZ*, A SCHOOL SUSPENSION CASE, HELD THAT AS LONG AS A PROPERTY DEPRIVATION IS NOT DE MINIMIS, THE DUE PROCESS CLAUSE APPLIES.

In *Goss v. Lopez*, 419 U.S. 565, 576, 579 (1975), this Court held that "the length and consequent severity of the deprivation... is not decisive of the basic right to a hearing of some kind," citing *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972). *Goss* involved a student suspension from high school for ten days without any pre-deprivation hearing. This Court held that the ten day suspension from school constituted a sufficient deprivation to trigger procedural due process protection. *Goss* further observed that as long as the deprivation is not de minimis, the gravity of the deprivation is irrelevant. 419 U.S. at 576. A number of the leading circuit court cases addressing the issue of whether or not an employment suspension triggers procedural due process protection relies upon this court's holding and rationale in *Goss*. See *Muscare*, 520 F.2d at 1215; *Garraghty*, 830 F.2d at 1299.

While an erroneous school suspension is serious, a wrongful suspension of employment subjects public employees to more grave deprivations including risks to their very subsistence. In *Muscare*, the Seventh Circuit held that "not only are alleged transgressions justifying suspension [of public employees] more serious than school discipline problems, but the corresponding penalties are potentially more damaging, for reputations, careers, and substantial amounts of pay are at stake." 520 F.2d at 1215. The court further observed that a twenty nine day suspension with loss of fourteen hundred dollars "can be disastrous to many civil servants." Id at n. 3 Here, Homar was subjected to a similar suspension of thirty days. For most law enforcement officers who are required to live from paycheck to paycheck, a thirty day suspension is tantamount to termination. With a suspension of the magnitude suffered by Richard Homar, many law enforcement officers would incur repossessions because of the extremely low salaries paid to most law enforcement officers.

V. A SUSPENSION OF EMPLOYMENT DEPRIVES AN EMPLOYEE OF SALARY WHICH IS A CONSTITUTIONALLY PROTECTED INTEREST.

A. *Sniadach v. Family Finance*: Wages Are A Specie Of Property

As a form of substantial monetary compensation, salary constitutes property within the meaning of the Due Process Clause. In *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), this Court construed Wisconsin's pre-judgment garnishment of wages procedure. The garnishment procedure provided that wages would be frozen based upon issuance of a summons at the request of the creditor's lawyer. This Court held that the deprivation of wages, without notice and prior hearing, violated fundamental principles of procedural due process.[11] *Sniadach* implicitly recognized that pay or wages constitutes property for purposes of procedural due process protection. *Cf. Parratt v. Taylor*, 451 U.S. 527, 68 L.Ed.2d 420 (1981), where the Court held that a prisoner's hobby kit valued at $23.50 constituted property for purposes of due process protection. To be sure, Homar's interest in not being suspended from his job is as constitutionally worthy as a prisoner's hobby kit.

In *Orloff v. Cleland*, 708 F.2d 372, 378 (9th Cir. 1983), the court held that "it is obvious that Orloff had a property interest in his salary," citing *Sniadach*. There, the government took unilateral deduction from the plaintiff's paycheck without any hearing. In *Board of Regents v. Roth*, 408 U.S. 564, 571-77

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[11] See *Begg v. Moffitt*, 555 F. Supp. 1344, 1349 (N.D. Ill. 1983)(longevity pay of police officers held to constitute a protected property interest).

(1972), this Court defined both property and liberty in the public employment context:

> Liberty and property are broad and majestic terms. They are among the great constitutional concepts... purposely left together meaning from experience... they relate to the whole domain of social and economic fact... it is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined... property interests... are created and their dimensions are defined by existing rules or understandings...

Roth's definition of property and liberty for purposes of interests in public employment encompasses suspensions as a form of deprivation.

VI. THIS COURT'S OPINION IN *RUTAN V. REPUBLICAN PARTY* HELD THAT ADVERSE EMPLOYMENT ACTION LESS THAN TERMINATION WAS CONSTITUTIONALLY ACTIONABLE AND THEREFORE SUPPORTS RECOGNITION OF DUE PROCESS PROTECTION FOR A SUSPENSION.

In *Rutan v. Republican Party*, 497 U.S. 62, 111 L.Ed. 2d 52 (1990), this Court held that various job related adverse action was constitutionally actionable. *Rutan* involved issues of whether hiring, promotion, transfer and recall from layoff decisions were constitutionally actionable. *Rutan* was grounded in First Amendment doctrine, however, that analysis is similarly applicable under the Fourteenth Amendment. There is no analytical distinction in deprivations under the First and Fourteenth Amendments. Other cases have demonstrated how demotions, diminished responsibilities or campaigns of petty harassment can trigger constitutional protection. E.g., *Smith v. Fruin*, 28 F.3d 646, 649 n. 3 (7th Cir. 1994).

CONCLUSION

> "It is procedure that spells much of the difference between the rule by law and rule by whim or caprice." *Joint Anti-Facist Committee v. McGrath*, 341 U.S. 123, 179 (1951)(Douglas, J. concurring).

> "[T]oo often law enforcement officers lose their jobs for frivolous reasons - or for no reason at all." Senator Jesse Helms, Congressional Record, January 31, 1991.

WHEREFORE, for the reasons stated herein and in Respondent's brief, this Court should affirm the decision below.

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FOR ARGUMENT

(11)

Supreme Court, U.S.
FILED
MAR 6 1997
CLERK

No. 96-651

In The

Supreme Court of the United States

◆

October Term, 1996

JAMES E. GILBERT, *et al.*,

Petitioners,

vs.

RICHARD J. HOMAR,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* THE PENNSYLVANIA STATE LODGE, FRATERNAL ORDER OF POLICE IN SUPPORT OF RESPONDENT

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A. The public employer's burden is not overwhelming, and the interest in removing delinquent public employees is adequately protected. 4

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The *amicus curiae* through the undersigned attorneys, respectfully submits this brief in support of respondent, Richard J. Homar. Because the question presented in the present controversy is of vital importance to the *amicus* and its members, consent of the parties has been sought and obtained for the filing of a brief to assist the Court.[1]

INTEREST OF THE *AMICUS CURIAE*

The *amicus*, the Pennsylvania State Lodge, Fraternal Order of Police, represents police officers throughout the Commonwealth of Pennsylvania in collective bargaining and employment disputes. The *amicus* and its members have substantial interest in legal issues affecting state and local government employees. Any deprivation within the Commonwealth of Pennsylvania of a public employee's rights to procedural due process and the repercussions therefrom will directly impact the rights and privileges of the *amicus'* membership.

The Court of Appeals' holding that a public sector employer must provide its employees with notice and an opportunity to be heard *prior* to any suspension without pay is a correct interpretation of the barest and most minimal procedures due such employees under the Due Process Clause. The decision appropriately defends the interests of public sector employees in their employment and accompanying income against unwarranted deprivation without due process. The threat of suspension without pay at the will of an employer would constitute an intrusion on the rights of the police officer membership of the *amicus* in addition to the rights of all public sector employees.

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[1] The parties' letters of consent to filing of a brief by *amicus* are filed with the Clerk of Court.

A post-suspension hearing does not eliminate the employer's essential obligation to provide a hearing before employees are deprived of significant property interests. When an employee is charged with misconduct and immediately suspended from duty, a post-suspension remedy cannot restore the employee to where he or she was prior to the suspension. The Due Process Clause bars the imposition of suspension without pay prior to precautionary scrutiny of underlying allegations against any accused employee.

SUMMARY OF ARGUMENT

Prior to deprivation of a valid property interest in employment, a public employee is entitled to notice of charges, an explanation of evidence and a meaningful opportunity to respond. The light burden on the employer is to provide notice of the reasons for considering disciplinary action and to hear the employee's explanation.

An employee who is suspended without pay has the substantial burden to find a new source of income and rebuild a career. The police officer members of the *amicus* are placed in especially difficult circumstances when suspended by their public employers because public confidence is a considerable factor in a police officer's effectiveness. Once suspended, the officer can never be made whole.

The Court of Appeals' decision preserves a meaningful opportunity for an employee to be heard prior to the imposition of suspension without pay. The procedure endorsed by the Court of Appeals here is not a departure from fundamental due process requirements.

ARGUMENT

PRIOR TO SUSPENSION WITHOUT PAY, PUBLIC EMPLOYEES ARE ENTITLED TO A MEANINGFUL OPPORTUNITY TO RESPOND TO THE CHARGES BROUGHT AGAINST THEM; THE FAILURE TO ACCORD THEM THAT OPPORTUNITY VIOLATES THEIR RIGHTS UNDER THE DUE PROCESS CLAUSE.

"No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const., amend. XIV, § 1. The due process issue in the present controversy is whether the respondent, Richard J. Homar, received adequate predeprivation protection. Homar has a property interest in his employment as a campus police officer for East Stroudsburg State University, and he was deprived of compensation for that employment without hearing.

The Court of Appeals correctly determined that due process requires a hearing before an individual can be deprived of his or her property interest in continued public employment. This essential tenant of constitutional law was memorialized in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), yet ignored by the public sector employer in this instance. The power to indefinitely suspend employees without pay is an almost unassailable weapon for public sector employers against which their employees will have no adequate remedy. A reversal of the Court of Appeals here would threaten the fundamental property rights of all public employees.

In *Loudermill*, the Court held that prior to deprivation of a valid property interest in employment, a public employee is entitled to notice of charges, an explanation of evidence and a meaningful opportunity to respond. Interpreting the parameters of *Loudermill*, the Court of Appeals for the Third Circuit accurately stated that a predeprivation hearing "is necessary, even if extensive post-deprivation remedies are afforded." *Gniotek v. City of Philadelphia*, 808 F.2d 241, 243, (3d Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987). Still, there may be some cases where the governmental interest is significant, the evidentiary basis of the action is straightforward and a prompt decision is necessary. *Federal Deposit Insurance Corporation v. Mallen*, 486 U.S. 230 (1988).

There are competing interests to consider in determining what process is due public employees facing possible suspension of wages. These interests include: the significance of the employee's property interest in retaining compensation and employment, the governmental interest in the expedient removal of a delinquent employee, the avoidance of administrative burden, and the risk of an erroneous determination. *See Matthews v. Eldridge*, 424 U.S. 319 (1976). "[D]ue process is flexible and calls for procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The measure of protection due a public employee when wage suspension is contemplated is determined by balancing the practical consequences and burdens which fall to the parties involved.

A. The public employer's burden is not overwhelming, and the interest in removing delinquent public employees is adequately protected.

Initially, it is worth exploring the level of protection that a pre-suspension hearing provides in light of the governmental effort involved in holding such a hearing. The fundamental requirements of *Loudermill* are that the employer notify the employee and afford the employee an opportunity to respond. In this regard, the administrative burden on the employer is relatively light.

In *Loudermill*, the Court held that individuals with protected property interest in continued public employment cannot be dismissed without due process. All that is required is notice of any accusations, a summary of the evidence supporting them and an opportunity to respond prior to the deprivation of protected interest. A *full* due process hearing can occur at a later time. *Loudermill* 470 U.S. at 545.

Pursuant to *Garrity v. New Jersey*, 385 U.S. 493 (1967), an employer can compel an employee to submit to administrative interrogation with certain conditions: the statements made and their fruits cannot be used in a criminal investigation or prosecution and the use of any statements is limited to internal disciplinary action. Refusal to answer questions after being apprised of the *Garrity* warnings can result in discipline, up to and including dismissal.

An employer can exercise the *Garrity* warnings at a pre-suspension hearing to determine the propriety or impropriety of suspension without pay. Prior to questioning, an employer need only inform the employee that the questioning concerns allegations and evidence and their relation to administrative matters and business of the public employer, that the questioning is not directed toward instituting criminal prosecution or for the purpose of securing additional evidence for a pending investigation or criminal action, and that any self-incriminating information and any fruits thereof cannot be used in criminal proceedings against the employee.

All matters discussed after *Garrity* warnings issue are to be administrative in nature and concern only the business of the public employer and its relationship with the employee; the employer can hold an employee responsible for not answering the questions truthfully or completely. After a public employer conducts a *Loudermill* hearing, the employer is entitled to impose any appropriate preliminary discipline and decide if any deprivation is necessary. Thus, employers' interest in maintaining the integrity of the public institution by suspending delinquent employees is adequately protected.

In the present matter, the Court of Appeals did not ask that the public employer continue to pay an employee whose behavior warranted suspension without pay. Any concern that employees with outstanding criminal charges will be permitted to work was addressed by the suggestion from this Court that "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending *with pay*." *Loudermill*, 470 U.S. at 544-45 (emphasis added) (footnote omitted). All material public safety concerns are addressed because an employee may be suspended with pay until a *Loudermill* hearing is arranged. If a public sector employer should choose to ignore this practical solution, it is not permitted to blatantly disregard the due process requirement that public employees cannot be suspended without pay prior to a *Loudermill* hearing.

B. Public employees have a right to predeprivation procedural due process because the risk of an erroneous suspension is substantial and irreparable.

All public employees are entrusted with some degree of civic responsibility; and police officers are held to an especially high standard in this regard. The primary duty of police officers is to maintain safety and security in the communities they serve. Police officers are exposed to the criminal elements of society regularly, and they are extremely visible to the general public as guardians and protectors of the law. As a result, any allegations of misconduct against police officers become matters of public record. Invariably such allegations are the subjects of articles in newspapers as well as radio and television newscasts. This media coverage in turn influences public opinion, and the accused police officers' professional reputations are forever tarnished.

Moreover once charges are brought against police officers, it is extraordinarily difficult for the officers to obtain fair treatment from their employers because of the publicity such charges generate. Public employers are naturally beholden to public opinion. In many cases the individuals deciding the fate of maligned police officers are elected officials politically motivated to abandon employees in favor of public sentiment. Additionally, false allegations are a realistic concern for police officers because they are exposed to many uncommon situations on the job.

Due to First Amendment concerns, police officers are not protected from adverse media coverage which generally serves to destroy their public image as well as their private lives. Police officers like all similarly situated public employees are, however, entitled to hearings before they are deprived of their public employment. Permitting public employers to suspend accused police officers before they are afforded an opportunity to respond to charges, as proposed by petitioners and their supporting *amici*, would put the immediate job security of all police officers at risk and ultimately jeopardize the safety of the masses they protect.

The Court must recognize that police officers are under intense scrutiny and that the public nature of a police officer suspension does irreparable damage to the suspended officer's integrity and reputation. A pre-suspension hearing is a minimal safeguard against the devastation that such a disgraceful suspension will cause. Police officers and other public employees must be afforded the opportunity to present a defense against charges in a predeprivation procedure to avoid the risk of erroneous suspension.

The turmoil caused by a loss of wages is also substantial. Greater weight must be placed on the public employee's substantial interest in the accuracy of a pre-suspension hearing. After wages are suspended, the employee might wait months before the case is resolved and the risk that a wrongfully suspended employee will be subject to lost wages and a lengthy wait for exoneration is intolerable.

Public employees suspended without pay are deprived of their livelihood and wages which might be the only means to provide sustenance for their families. During suspension, the employees' search for work may be significantly impaired by the charges against them, or by the possibility that they might return to public employment if the suspension is lifted. Access to public assistance might also be problematic because of the pending charges. Without an alternative source of income, such employees will be hard pressed to meet living expenses.

Moreover, there is no certainty that an unjustly suspended employee will ever be made whole. The postponement of wages, the personal consequences of the suspension and the loss of opportunity to work can never be paid back. The fact that such drastic circumstances might befall an unjustly punished employee is not acceptable. Nonetheless, petitioners and their supporting *amici* seek a result where the wages of public employees can be suspended without any meaningful opportunity to present defenses against charges.

The Due Process Clause, as interpreted by the Court of Appeals in this matter and this Court in *Loudermill*, protects public employees from undue harm. To overturn the Court of Appeals' interpretation would mean that Federal, State, County and Municipal employees across the nation will be subject to unpaid suspension for indefinite periods without reason. Due process requires that such action shall not occur until the employee has been granted at least the "opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 313 (1950).

Essentially, all the government employer must do is notify the employee of the reasons for considering discipline without pay and thereafter, give that employee some opportunity to defend himself or herself against any allegations. When compared to the monumental burden on the employee who suffers the unpaid suspension, such concerns are minuscule. A suspended employee has to consider how he or she will meet living expenses, try to eradicate the inevitable damage to reputation that such a suspension will cause, and start to rebuild his or her career. Even assuming the suspension is overturned, the employee is reinstated and awarded back pay, he or she cannot be made whole. There is no way to undo the damage done to his or her career because public employees are dependent upon their relationships with the community in which they serve.

To be truly meaningful, an opportunity for a hearing must be afforded at a time when the potentially irreparable and substantial harm caused by suspension can still be avoided. *See Barry v. Barchi*, 443 U.S. 55, 74 (1979) (Brennan, J., concurring in part).

C. The process due accused employees requires that a predeprivation hearing take place prior to suspension without pay.

The government cannot authorize the deprivation of an employee's property interest in public employment without certain procedural safeguards. *Arnett v. Kennedy*, 416 U.S. 134 (1974). The Due Process Clause requires at least a hearing before an individual is deprived of a property interest. *Boddie v. Connecticut*, 408 U.S. 371 (1971).

In *Everett v. Napper*, 833 F.2d 1507 (11th Cir. 1987), the Court of Appeals for the Eleventh Circuit determined that a firefighter was entitled to a pre-suspension hearing because the suspension was without pay. The due process requirement for a pre-suspension hearing was also maintained in *Engdahl v. Department of the Navy*, 900 F.2d 1572 (Fed. Cir. 1990), where the court found that a Navy electrician charged with indecent assault was afforded adequate procedural due process because he had the opportunity to rebut the basis of a proposed suspension at a meeting specifically scheduled for that purpose. Indeed, a hearing is required prior to the deprivation of compensation for employment because such an action takes away a principal interest an employee has in his or her job.

Petitioners and their supporting *amici*, contend that a post-deprivation hearing suffices. The Court has considered the severity of depriving an individual of his or her livelihood and pointed to two significant factors that weigh in favor of holding a hearing before depriving an employee. One consideration is the burden on the employee to find similar employment. *Lefkowitz v. Turley*, 414 U.S. 70 (1973). A second consideration is the interest in giving an employee the opportunity to present a case in defense of mounting charges so that an accurate and fair decision regarding impending deprivation or reconciliation can be made. *Goss v. Lopez*, 419 U.S. 565 (1975).

The present matter illustrates the need for such considerations. The employer implemented suspension without pay and did not afford any procedural guard against the loss of employment and compensation. The suspension was based solely upon a criminal complaint. The employee was not fully apprised of the charges of misconduct against him prior to suspension even though the evidence included alleged admissions. Furthermore, all criminal charges were eventually dismissed.

If a governmental employer seeks to suspend the pay of an employee for any reason, such employer is bound to provide due process by holding a hearing to determine the propriety of such suspension. This requirement is plainly stated in *Loudermill* as follows:

> The essential requirements of due process, and all that respondents [employees] seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.

Loudermill, 470 U.S. at 546.

Regardless of the exigency with which a public employer perceives its need to remove an employee either temporarily or permanently, that employer does not have the capacity to ignore the Due Process Clause. A suspension of compensation is not permitted without due process.

> The governmental interests in **immediate** termination does **not** outweigh these interests. As we shall explain, affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a

> qualified employee on than to train a new one. A governmental employer also has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counter-productive step of forcing its employees onto the welfare rolls.

Loudermill, 470 U.S. at 544. The procedure endorsed by the Court of Appeals here is not a departure from the very basic due process requirements set forth in *Loudermill.*

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 7 1997
CLERK

No. 96-651

In The
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OCTOBER TERM, 1996

JAMES E. GILBERT, President, East Stroudsburg
University, *et al.*,
Petitioners,

v.

RICHARD J. HOMAR,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC. IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS

Amicus curiae the National Association of Police Organizations, Inc. (hereinafter "NAPO") submits this brief in support of Respondent Richard J. Homar's arguments for affirmance of the judgement in this case of the United States Court of Appeals for the Third Circuit which reversed the trial court's granting of summary judgement to the Petitioners. The Court of Appeals found that the Fourteenth Amendment to the United States Constitution requires that both notice and an opportunity to be heard are to be given to a tenured public employee (in this case, a police officer) who is accused, but not proven guilty of, wrongdoing, prior to the termination or suspension without pay of that employee.

NAPO is a nationwide non-profit association of professional, labor and trade organizations, headquartered in Washington, D.C., which represents state, local and federal law enforcement officers. Through its 3,500 state and local affiliates, NAPO actively represents approximately 190,000 sworn, rank-and-file law enforcement officers throughout the country. In 1994, NAPO founded the National Law Enforcement Officers' Rights Center, which advocates the necessity of assuring fundamental due process rights for law enforcement officers in the face of increasing political pressures for the investigation, prosecution, both civil and criminal, and punishment, of police.

NAPO has an important interest in this case, as the case presents issues the resolution of which will define the extent to which law enforcement officers throughout the United States are entitled to the basic constitutional protections of governmental notice and opportunity to be heard prior to the governmental deprivation of the citizen-officer's property. These rights, unfortunately, have been and are in increasing danger of erosion due to prosecutorial and administrative reaction to perceived public "outrage" towards police. Internal police department investigation into the conduct of individual officers is routine. Civil and criminal prosecution of individual officers is rapidly increasing at both the state and federal levels. Officers' rights are in grave danger of being sacrificed upon the altar of political expediency. A clear enunciation of the rights enjoyed by individual officers accused of wrongdoing is of crucial value to the officers represented by NAPO, as well as to the various departmental, judicial, defensive and prosecutorial entities involved.

NAPO has received the written consent of Petitioners James E. Gilbert, *et al.*, and of Respondent Richard J. Homar, to the filing of this brief as required by Rule 37.3 (a) of the Rules of this Court. The original copies of all consents have been filed with the Clerk of the Court as required by that Rule.

SUMMARY OF ARGUMENT

Petitioners, in their brief to this Court, argue that "little useful purpose would [be] served" by providing a law enforcement officer who has been accused of misconduct an opportunity to explain himself prior to the loss of his job. Petitioners' Brief at p. 20. Petitioners also characterize such a hearing as "pointless" and assert that the suspension from employment of a police officer who has been accused of criminal misconduct is "a paid vacation". *Ibid* at p. 22.

Amicus curiae suggests that, within the context of judicial analysis of the burden placed upon state or local government by having to comply with constitutional obligations of notice and opportunity to be heard prior to the termination or suspension without pay of a tenured public employee, this Court should note the already extant framework within which police officers are investigated and disciplined. *Amicus curiae* asserts that the existing framework is so widespread, so familiar, so effective, and so well grounded in the most fundamental of Anglo-American concepts of due process that it constitutes persuasive grounds upon which to hold that state and local governments are not, in fact and in actual practice, unduly burdened by having to provide notice and an opportunity to be heard, prior to termination or suspension without pay, in each and every case where a tenured law enforcement officer is accused of wrongdoing

ARGUMENT

THE EXISTING CONSTITUTIONAL FRAMEWORK WITHIN WHICH POLICE OFFICERS ARE INVESTIGATED AND DISCIPLINED IS SUFFICIENTLY SWIFT, FAMILIAR, AND EFFECTIVE SO AS TO RENDER UNNECESSARY THE IMMEDIATE SUSPENSION WITHOUT HEARING AND WITHOUT PAY OF ANY OFFICER ACCUSED OF WRONGDOING.

Individual law enforcement officers execute their official duties under the greatest scrutiny. Their actions, both public and private, are continuously monitored and investigated by their own departments, civilian and professional review boards, state and local regulatory commissions, the print and electronic media, and state, local and federal investigators and prosecutors. This scrutiny has intensified within the last few years as isolated cases involving controversial police actions, including the case at bar, are cited as proof by some that all police cannot be trusted, that all police are brutal, or that all police are racist. Neither this Court nor the people of this nation would stand for such painting with a broad brush of other identifiable groups of individuals. Yet it has become sadly fashionable to negatively stereotype law enforcement officers in a way that would be intolerable if applied to African-Americans, women, Jews, Catholics, homosexuals, persons with disabilities or the elderly. State and federal prosecutors and administrators, not immune from the political pressures of the times, are at least tempted to afford individual law enforcement officers accused of wrongdoing a little less due process than another person similarly situated might receive.

The federal courts of this country have traditionally been a place of vindication for the rights of the politically unpopular individual. In 1967, in another time of popular dissatisfaction with governmental policy being directed at individual representatives of the lawful authority of government, be they individual police officers or soldiers, this Court took the significant step of announcing what might seem a self-evident truth: "[T]hat policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity v. New Jersey,* 385 U.S. 493, 500 (1967). *Garrity* and its progeny have yielded a familiar and workable legal framework, well-grounded in the Constitution, for the securing by internal and administrative investigators of evidence concerning officers who have been accused of misconduct. *See, e.g., United States v. Camacho,* 739 F.Supp. 1504, 1512-15 (S.D.Fla. 1990) (outlining settled constitutional standards of internal police investigations). These effective and constitutional procedures were ignored in the investigative stages of the case at bar, however, despite the fact that the honoring of Officer Homar's rights as a citizen would have proved no obstacle to the *lawful* investigation and prosecution of his alleged criminal misconduct.

Under the *Garrity* process, individual officers may be compelled to testify regarding allegations of misconduct, on pain of losing their jobs should they refuse, consistent with the Constitution because those statements are immunized from use, "directly and indirectly", against the officer in any subsequent criminal proceeding. *Garrity,* 385 U.S. at 500. *Kastigar v. United States,* 406 U.S. 441, 453 (1972). Internal affairs investigators, prosecutors, defense attorneys, union representatives and individual officers are familiar with and understand the practical as well as constitutional dimensions of being called in and compelled to testify about allegations of police misconduct. *See*, Warnken, *The Law Enforcement Officer's Privilege Against Compelled Self-Incrimination*, 16 U.Balt.L.Rev. 452, 492-515 (1987) (survey of various state statutes codifying constitutional procedures mandated by *Garrity*); *Rights of Police Officers During Internal Investigations: Hearing before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102nd Cong., 2nd Sess., *passim* (1992) (testimony of witnesses reflecting status of police internal investigative procedure across country). The fact that the individual officer's testimony may not be used against him or her in a subsequent criminal prosecution does not prohibit the police department from appropriately disciplining the officer, including suspending the officer without pay, demoting him or her, or terminating him or her from employment. Nor does the fact that the particular statement and its fruit are prohibited to be used against the officer in a subsequent criminal proceeding prevent the investigation, arrest, charging, prosecution, conviction and punishment of the officer, through independent, non-compelled self-incriminating testimony or any other *lawful* means.

Investigators, administrators, and attorneys who are charged with the duty to oversee police have in particular become practiced and adept at monitoring and evaluating the process of investigating officers accused of wrongdoing. Where, as in this case, the accusation involves an allegation of criminal misconduct, the obligation upon administrators is generally no more burdensome than isolating Fifth Amendment violation-tainted evidence from trial prosecutors as well as other investigators who are continuing to actively work the case. *See,* Unreported Order of the District Court Granting Request for *Kastigar* Hearing, reprinted as Appendix E of the *Petition for Writ of Certiorari* in *Koon v. United States,* United States Supreme Court Case No. 94-1664 at pages 151a-153a. Most significantly, local, state and federal prosecutors and administrators have proved able in fact to secure convictions against officers guilty of criminal misconduct by *lawfully* and *constitutionally* prosecuting those officers. Additionally, just as police have found that honoring suspects' constitutional rights has not frustrated their ability to secure arrests and convictions, so administrators and police managers have learned that tenured employees, including accused police officers, can be quickly and sustainably suspended without pay or terminated using *constitutional* means as a *practical* matter.

It being well-settled that the Constitution's protections may be properly demanded *by* individual police officers as legitimately as those protections may be demanded *of* police officers, officers, departments, investigators, courts and prosecutors have come to rely upon the settled law in this area to guide them in the administration of internal and administrative matters to a degree not found in any other profession. Seen in this context, the Petitioners' proposed circumscription of the extent of the protection of the Fourteenth Amendment's Due Process Clause is a matter of profound concern to law enforcement. At the individual level, officers would, under the Petitioners' view of the Due Process Clause, reside under an interpretation of the Constitution that expressly refuses to recognize fundamental due process protections to the same extent as recognized by various federal circuits and state courts of last resort.

At the organizational level, well-established, workable and effective means of addressing allegations of misconduct while honoring individual officers' fundamental rights are in substantial danger of being thrown into chaos because of the uncertainty injected into the system by the Petitioners' views.

At the professional level, attorneys, police administrators, union representatives and shop stewards would stand unsure of the status of the law and uncertain how best to advise officers and other clients regarding these most fundamental of rights. While some uncertainty may be inherent in advising clients of their rights under the law, this Court ought to seize the opportunity to clarify those rights when possible, as here. A simple and definitive declaration by this Court that constitutional due process does, in fact, always mean governmental provision of notice and an opportunity to be heard *prior to* the deprivation by the government of *any* citizen's lawful property, it is respectfully suggested, is what is called for in the circumstances of this case.

This opportunity is all the more imperative when such a clarification would serve to vindicate the rights of persons who, despite being viewed as presently unpopular, or, rather, because of that very fact, are especially in need of our Constitution's protections.

CONCLUSION

For the foregoing reasons, *amicus curiae* the National Association of Police Organizations, Inc. respectfully requests that the Court affirm the judgement in this case of the United States Court of Appeals for the Third Circuit, and remand this cause to the trial court for further proceedings not inconsistent with this Court's opinion.

Respectfully submitted this 7th day of March, 1997,

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